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Supreme Court of the United States.

OCTOBER TERM, 1899.

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Term No. 216. Case No. 17,309.

Filed Mar. 19, 1900.

HENRY P. CLARKE,

PLAINTIFF IN ERROR,

vs.

NANCY B. CLARKE, JOHN H. PERRY, Guardian ad Litem of NANCY B. CLARKE, and HENRY P. CLARKE as Administrator of the Estate of JULIA CLARKE, deceased,

DEFENDANTS IN ERROR.

In Error to the Supreme Court of Errors of the State of Connecticut.

BRIEF

In behalf of the Defendants, Nancy B. Clarke and John H. Perry her Guardian ad Litem.

JOHN H. PERRY,
WINTHROP H. PERRY,
Attorneys for Defendants.

JOHN H. PERRY,
of Counsel.

THE MARIGOLD PRINTING CO., BRIDGEPORT, CONN.

Supreme Court of the United States.

October Term, 1898.

HENRY P. CLARKE,
Plaintiff in Error.

vs.

NANCY B. CLARKE, JOHN H. PERRY, GUARDIAN AD LITEM OF NANCY B. CLARKE AND HENRY P. CLARKE AS ADMINISTRATOR OF THE PERSONAL ESTATE OF JULIA CLARKE DECEASED.
Defendants in Error.

TERM NO. 216.

CASE NO. 17303.

BRIEF FOR NANCY B. CLARKE AND JOHN H. PERRY, HER GUARDIAN AD LITEM, DEFENDANTS IN ERROR.

I.

CHRONOLOGICAL STATEMENT OF THE FACTS PERTINENT TO THE PRESENT CONTENTION.

One Julia H. Clarke, the wife of the plaintiff in error and a resident of South Carolina, died February 10, 1894, owning a homestead in that State and a large amount of valuable land in Connecticut.

She left a will and two infant daughters, Nancy (this defendant) and Julia.

Julia survived her mother but three months.

The will was duly probated in South Carolina and the plaintiff in error qualified as executor thereof.

A copy of the will is found on page 15 of the record.

In June, 1895, the plaintiff in error "*as executor of the last will and testament of Julia H. Clarke, and trustee of Nancy B. Clarke*, his infant daughter under said will," brought suit against the said Nancy as sole defendant in the Circuit Court for the fifth judicial circuit of South Carolina praying for "the judgment and direction of the Court in regard to the true construction of said will and especially the fifth and residuary paragraph thereof and as to his powers and duties as such executor and trustee under said will in the premises and for such further relief as may be just and proper." (Record p. 14, par. 13.)

No other persons are made parties to the suit and these parties appear in no other capacities than as above specified.

After hearing had, the above Court on August 30, 1895, rendered judgment "that the will of the testatrix Julia H. Clarke, worked an equitable conversion into personalty at the time of her death of all her real estate of whatsoever description and wheresoever situated and that the plaintiff as executor receive, administer and account for the same as personalty and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will and that he have leave to apply for further orders and directions upon the foot of this decree." (Record p. 14, par. 13.)

This judgment was affirmed by the Court of last resort in South Carolina on March 18, 1896.

Up to this date administration had not been granted upon the estate of Julia Clarke, the infant daughter, although one-third of the residue of her mother's estate by the terms of her mother's will (record top p. 16) had vested in her two years before and now belonged to her (the daughter's) heirs free from the trust.

On February 1, 1897, the father was appointed administrator of the daughter Julia's estate in South Carolina (record p. 15, par. 16) and in the following month was appointed ancillary administrator in Connecticut.

He there filed an inventory of the estate of the said daughter as consisting of "an undivided one-third interest in the real estate" above referred to as having belonged to her mother in Connecticut (record p. 6, folio 19; p. 8, folio 20; p. 14, par. 11).

On the 29th of May, 1897, he (solely in his capacity as such administrator) presented a petition to the Connecticut Court of Probate, (record p. 6, folio 19) alleging that the infant intestate "died possessed of real estate" within that jurisdiction and asking the Court to determine to whom it should be distributed.

The administrator in his official capacity and the surviving daughter by her guardian ad litem and no others appeared and were heard on this petition, (record bottom p. 7 and top p. 8.)

The Court of Probate decreed that the sister Nancy was sole heir to and distributee of the property in question.

Thereupon the plaintiff in error *in his individual capacity* appealed to the Superior Court.

His reasons of appeal (p. 12, folio 27) contain no suggestion that his rights depend upon the South Carolina judgment or are affected by the Federal Constitution, neither does the record of the Court of Probate, (bottom p. 7 and top p. 8) indicate that any one claimed in that Court that its order was to be concluded by such considerations.

The Superior Court reserved the questions of law arising in the case for the advice of the Supreme Court of Errors. That Court advised the Superior Court to affirm the decree of the Probate Court, (record p. 18, folio 35). It did so, (record p. 39).

This formal affirmance however was not necessary. The appeal might as well have been simply dismissed or "no error"

found. The Probate decree is to-day the *final* and *only* (as well as the first) judgment determining the question of distribution.

> "An appeal from Probate does not of itself vacate the decrees appealed from. They remain in full force until the appellate tribunal otherwise determines; but the Probate Court ought properly to be *advised* as to the action of the higher Court in respect to all the decrees appealed from, although a judgment by the Superior Court affirming them is not strictly necessary."
>
> Dickinson's Appeal, 54 Conn., 224, 231.

From this judgment of affirmance an appeal was taken to the Connecticut Court of Errors, (record p. 44, folio 75) and "no error" found, (p. 46, folio 77).

Both in the Superior Court and in the Court of Errors the father claimed in argument that that part of the South Carolina judgment which holds that the mother's will "worked an equitable conversion into personalty at the time of her death of all her real estate wherever situated" was not only under the Federal Constitution binding and conclusive in his favor upon the Courts of Connecticut but was also sound in law, (bottom p. 43 and top p. 44).

No finding in the judgment and no other adjudication by it was relied on.

These claims having been overruled he brings this writ of error.

II.

BRIEF SYNOPSIS OF THE SITUATION IN THE LIGHT OF THE FACTS ABOVE DETAILED.

On February 10th, 1894, one third of the residuary estate of the mother became by the terms of her will (top p. 16) vested in the daughter Julia, subject to a temporary trust.

Three months afterwards the daughter Julia died intestate, the trust terminated and her heirs became the absolute owners

of the aboved mentioned third. Part of it consisted of real estate in Connecticut, the transfer and devolution of which is confessedly to be determined by Connecticut law (as witness for instance the application to the Connecticut Court of Probate on that very question at the beginning of this suit).

By Connecticut law this real estate descended at once to her sister Nancy. Nancy remained the actual owner of this real estate until (as is now claimed) the judgment in the South Carolina suit something more than a year afterwards.

The Connecticut decision now in question demonstrates this; for whatever the result of the present writ of error may be, that decision declares what the law *was* and *will remain* in Connecticut, and what the title was and *really is* there. This writ of error does not attack the accuracy of that declaration. It only seeks to prevent Nancy from taking the benefit of the actual law, and her real title, through an estoppel "which ever admits but fences off the truth."

Her father claims that after the South Carolina judgment she was for the future estopped to claim what, as we have seen, had up to that time been undoubtedly hers. Connecticut had given her the title. Connecticut insists that she shall keep it. South Carolina says no! Which shall prevail?

It is evident from the form of the inventory, from the form of the application to the Connecticut Court of Probate at the beginning of these proceedings, from the absence of any suggestion of estoppel in the Probate Record, and from a like absence in the Reasons of Appeal in the Superior Court that the father did not for a long time suppose that the South Carolina decision *proprio vigore* accomplished anything in Connecticut or estopped anybody there. He apparently paid no attention to its command to sell the real estate and distrusted the efficiency of its suggestion that he had power so to do. He passed it on as "real estate" to his daughters representatives and so described it in the application to the Probate Court already referred to.

If the fact that the record does not show that he appeared individually in the Probate Court and made the present consti-

tutional claim there, coupled with the fact that the Probate order has always remained and still is the only judgment in the case determining the descent (Dickinson's Appeal supra), deprives him of a right of review here, we desire to take advantage of it but shall not argue it further.

We now proceed to consider his claim that his daughter is estopped to further insist upon her undoubted title to the Connecticut land in question. Right here it may be noted that this estoppel can be based only on the judgment of the lower Court in South Carolina and upon that *single clause* of it which holds that "the will of the testatrix Julia H. Clarke worked an equitable conversion into personality at the time of her death of all her real estate of whatsoever description and wheresoever situated." No expressions in an opinion can create an estoppel. (Hancock Nat. Bk. v. Farnum, 20 R. I., 466.) If the claimed estoppel exists at all, it must be based upon that brief portion of the judgment above quoted which was alone relied upon on the appeal below, (p 43, folio 74) and which simply determines the legal effect of the language of the will.

III.

A FEW GENERAL PRINCIPLES APPLICABLE TO THE DISCUSSION.

In the case of the Farmers' Loan and Trust Company vs. The Postal Telegraph Company, 55 Conn. 334-335, (in which case the authorities cited by Counsel show that the claim of res judicata was made) the Supreme Court of Errors of the State of Connecticut said: "The Courts of our State will not recognize the right of Courts in other States to affect directly the title to real estate in the former. The most that can be done is to allow foreign courts having jurisdiction of the parties to compel conveyances by the owner and recognize as valid titles so acquired.

We are aware of no case that has gone so far as to recognize the validity of a deed given by a referee or other officer of Court by authority of law in another jurisdiction. The rule

seems to be, that the Courts of each State have exclusive jurisdiction to settle the title to lands within its own limits."

This rule was followed by that Court in the case at bar.

This rule is also affirmed in the decisions of many other of the State Courts and is abundantly sustained in the decisions of this Court.

From before the early leading case of McCormick vs. Sullivant, 10 Wheaton 192 (1825) to the late case of DeVaughn vs. Hutchinson 165 U. S. 566, (1896) this Court has always held as to real estate: (Quoting from the latter case p 570). "It is a principle firmly established, that to the law of the State in which the land is situated, we must look for the rules which govern its descent, alienation and transfer, and for the *effect* and *construction* of wills and other conveyances."

If, as in this case, the Connecticut Court determines to adopt this general rule as to Connecticut real estate, it is immaterial whether the rule is or has been approved by any other Court, State or Federal, unless the Connecticut Court is restrained by some limitation of the Federal Constitution for "International Comity has nothing to do with titles to real estate."

White vs. Howard. 46 N. Y. 144, 167.
See also Green vs. VanBuskirk 5 Wall 307.

Neither could the South Carolina Court well ask by way of comity what it would not reciprocally permit:

> "We think it may be admitted as a general proposition, that such operation is given to acts done in other jurisdictions, as they give to like acts done in ours, upon considerations of comity; but it is a general comity and reciprocity of rights and advantages."
>
> Means vs. Hapgood, 19 Pick 105, 107.

As the decisions of the Court of South Carolina show, that Court claims exclusive jurisdiction over land there situated.

"But neither in England nor in this State is it a part of the law that the law of the domicile has any efficacy when the subject is real estate."

* * * * * * * *

The lex rei sitae governs, "whether the controversy relates to the capacity of persons to take and transfer, to the forms and solemnities of passing the title, to the extent of the interest to be taken or transferred, or to the subject matter, or what are to be deemed immovables."

Lamar vs. Scott, 3 Strob., S. C., 562, (1849).

"All the authorities in both countries, so far as they go, recognize the principle, in its fullest import, that real estate or immovable property is exclusively subject to the laws of the government within whose territory it is situate."

Approved in Beall vs. Lowndes, 4 S. C., 258, 283, (1872).
See also Abrams vs. Mosely, 7 S. C., 150, 152, (1875).
Cureton vs. Mills, 13 S. C., 409, 417, (1879).

It is however claimed by the plaintiff in error that the Connecticut Court has disregarded the provisions of Section 1, Article IV, of the Federal Constitution which provides that:

"Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

But among the defenses not excluded by the above provision of the Federal Constitution are:

"Such as inquire into the jurisdiction of the Court in which the judgment was given, to pronounce it; as the right of the State itself to exercise authority over the persons or the subject matter.

It has been well said 'the constitution did not mean to confer a new power of jurisdiction but simply to regulate the effect of the acknowledged jurisdiction over *persons* and *things* within the State.'" * * * * * *

"The constitution has effected no change in the nature of

a judgment. It only provides that as matter of evidence it shall be entitled to full faith and credit."

McElmoyle vs. Cohen, 13 Peters, 312, 327, 329.

Or, as it was somewhat differently phrased later, this constitutional provision "does not prevent an inquiry into the jurisdiction of the Court in which a judgment is rendered to pronounce the judgment, nor into the right of the State to exercise authority over the parties or the subject matter. * * *

The constitution did not mean to confer any new power on the States, but simply to regulate the effect of their acknowledged jurisdiction over *persons* and *things* within their territory. It did not make the judgment of the State's domestic judgments to all intents and purposes but only gave a general validity, faith and credit to them as evidence."

Cole vs. Cunningham, 133 U. S., 107 (112).

See also Thompson vs. Whitman, 18 Wall 457, 465, 469.

Story on the Constitution, Sec. 1313.

Jurisdiction is defined as that which

"has reference to the power of the Court over the *parties*, over the subject matter, over the *res or property in contest*, and to the authority of the Court to render the judgment or decree which it assumes to make."

Cooper vs. Reynolds, 10 Wall, 308, 316.

A judgment rendered by a Court without jurisdiction is a nullity although the defendant appeared, answered and went to trial without objection.

Riddle vs. Reese, 53 So. Car., 198.

IV.

THE PLAINTIFF IN ERROR CANNOT THEREFORE MAINTAIN HIS ESTOPPEL UNLESS THE ADJUDICATION OF THE SOUTH CAROLINA COURT WAS

A. Between the same parties acting in the same rights or capacities (or their privies).

B. Upon the same question.

C. Within the jurisdiction of the Court in respect of the Connecticut lands, both as to the nature of the action and as to the relief granted or order and decree made.

A.

THE PARTIES WERE NOT THE SAME.

As understood in Connecticut a question to be *res judicata*

> "Must be established by a final judgment; it must have been in issue under the pleadings and must also have been actually litigated and determined; it must be identical with the fact sought to be established in the second action; the identical persons between whom the fact was adjudicated *in the same right or capacity*, or their privies claiming under them, must be the parties to the second action."
>
> Fuller vs. Metropol. Life Ins. Co., 68 Conn., 55, (65).

The Connecticut Court in the case at bar accordingly decided that the South Carolina case lacked the requisite identity of parties to work the estoppel claimed.

This is based upon the following facts: Henry P. Clarke was not a party to that case in his individual capacity at all. He only appeared as "executor and trustee" under his wife's will. No representative of the estate of the daughter Julia (*which estate is alone in question here*) was made a party or appeared or even in fact existed. To these may be added the fact that Nancy was evidently made a party solely in her capacity of cestui que trust under her mother's will and not at all as heir of Julia. The pleadings appear to have left the estate of Julia entirely out of Court (record p. 14, par. 13). While in the case at bar the parties appear exclusively as heirs of Julia.

In support of the decision in the Court below upon this question of parties, we beg to submit the following authorities in addition to the reasons and precedents contained in the decision itself.

"That the record of a judgment can affect only parties and privies and that no one shall have advantage from it who would not have been prejudiced by it are principles with which every lawyer is supposed to be familiar."

Shulze's Appeal, 1 Penn. State, 251.

"It is a rule of both the civil and the common law that a party acting in one right can neither be benefitted nor injured by a judgment for or against him when acting in some other right. As familiar illustrations of this rule it is said that a judgment against one as tutor will not prevent his recovering the same demand in his own right. * * * Where a party has rights or claims property in two or more capacities and is made a defendant in some action or proceeding the pleading against him should show that he is made defendant in each capacity and failing to do so the judgment will often bind him in one capacity only, though he might have been bound in both by appropriate pleadings. * * * If one is made a defendant in an official capacity the judgment will not bind him personally and if made a defendant personally it will not bind him officially."

Freeman on Judgments, 4th Ed. Sec. 156.

"Judgments as a general rule conclude the parties only in the character in which they sue or are sued and therefore a judgment for or against an *executor*, administrator, assignee, *trustee*, agent or attorney as such does not ordinarily preclude him in a different cause of action affecting his own proper person from disputing the special findings in the former cause. * * * There are some apparent, but perhaps no real exceptions to this rule."

Bigelow on Estoppel, 4th Ed. p. 123.

"To ascertain whether a past judgment is a bar to another suit, we are to consider, ———————————— secondly whether the former litigation was between the same parties, in the same right or capacity litigating in the subsequent suit, or their privies respec-

tively, claiming through or under them, and bound and estopped by that which would bind and estop those parties."

Bigelow and another vs. Winsor, 1 Gray, 299, 302.

"It is declared in the article 2265 of the Louisiana Code 'that the authority of the thing adjudged takes place only with respect to what was the object of the judgment.

The thing demanded must be the same: the demand must be founded on the same cause of action, the demand must be made between the same parties and formed by them against each other *in the same quality.*' * * * *

Therefore upon well settled principles coincident with the article 2265 and also independent of it, nothing that was said or done in the case in 12 How. can prejudice her claim as she now makes it."

Gaines vs. Hennen, 24 Howard, 553, 579.

"The essential conditions under which the exception of the res judicata becomes applicable are the identity of the thing demanded, the identity of the cause of the demand, and of the parties *in the character* in which they are litigants."

Washington A. & G. S. P. Co., vs. Sickles 24 How. 333,341 & 2.

Approved, 7 Wall, 102.

"Where a party is sued in one capacity only the judgment estops him as to the capacity in which he is sued and none other."

Bumb vs. Gard, 107 Ind., 576.

A and B were made defendant's only as heirs of C although they *were* devisees of D, (C's wife) at the same time.

"It follows that in their character of such devisees they were not concluded by the order of sale."

Elliot vs. Frakes, 71 Ind., 416.

Where vendor was heir at law of deceased vendee, and as such heir alone was made party to petition of decedent's, administrator to sell the land the judgment did not estop him, as creditor of decedent in a suit for his vendor's lien since "as a general rule judgments conclude the parties only *in the character in which they sue or are sued.*"

Lord vs. Wilcox, 99 Ind., 491.

Judgment for one as guardian does not bind him individually although he might have alleged and litigated his individual interests.

McBurnie vs. Seaton, 111 Ind., 56.

"The general rule likewise is that judgments are only presumptively conclusive against parties in the character in which they sue or are sued."

Adair vs. Mergentheim, 114 Ind., 305.

"When a man sues in one right and fails that is no reason why he may not sue again in another right. If a man sues as executor and fails may he not nevertheless sue again in his individual capacity? Most certainly he may."

Brooking vs. Dearmond, 27 Georgia, 58, 65.

A former adjudication in a case for construction of a will to which case the executors and the appellants in the case at bar were parties (top p. 321) and from which adjudication the respondent in the case at bar, although not a party of record, had a right of appeal does not bind said respondent although a devisee under the will.

Shipman vs. Rollins 98 N. Y. 311, 330.

" The mere fact that the same persons are litigants in the two actions is not always sufficient to satisfy the rule of res adjudicata.

The same person may in law be considered another person and consequently another party by suing in another capacity. * * *

The rule is that a former judgment concluds the party only in the character in which he was sued and therefore

a judgment for or against an executor, administrator, assignee or trustee as such, presumptively does not preclude him in a different cause of action affecting him personally from disputing the findings or judgment though the same questions are involved. * * * * *

The plaintiff now prosecuting in his own proper person representing only his interest as an individual, is not concluded by the prior judgment against him in a representative character, because he must now be regarded in law as a different person and a stranger to the former suit."

Collins vs. Hydorn, 135 N. Y., 320, 324.

The case of Aspden vs. Nixon 4 How. 467, cited in the opinion of the Court below, bears not only upon this point but also upon other points hereinafter made. A brief synopsis of the facts and some quotations from the opinion are as follows:

A. died in England the place of his domicil testate leaving "property" both there and in Pennsylvania. This property consisted apparently in part of personalty.

N. qualified as executor of the will in both jurisdictions. A contest arose as to who was the true beneficiary under the testamentary designation of "heir at law."

In a suit pending in Pennsylvania against said executor to determine this question the Pennsylvania Administrator of one John Aspden of London, together with John's children, appeared as parties and claimed that the said John was intended by the designation "heir at law." N. the above named executor made defense that the said children acting as the English administrators of the said John had tried out this same question in London against him as executor there and been defeated.

The Court among other things said: p. 497.

"The representative character of Nixon in England was altogether distinct from his character as executor in Pennsylvania, and so also the English Administrators of John Aspden's estate are equally distinct from * * the Administrator of his estate in Pennsylvania. It follows the English suit was between different parties from

those prosecuting and defending the American suit, and therefore neither the decree nor the proceedings on which it is founded are competent evidence between the parties to the present suit for this reason; and yet more conclusively for another which is that the property in controversy here is distinct from that sued for in England.

As applicable to such a state of facts the rules of evidence governing Courts of Justice are that a judgment or decree set up as a bar by plea or relied on as evidence by way of estoppel to be conclusive must have been made

1. By a Court of competent jurisdiction upon the same subject matter.
2. Between the same parties.
3. For the same purpose.

And on either ground the evidence submitted to our judgment is incompetent to prove anything in regard to the Pennsylvania assets.

But these conclusions are resisted by these setting up the bar on this ground that the administration of the domicile is the principle administration * * * and this being in England and the assumed devisee's residence also being there, the Pennsylvania administration was auxiliary to the foreign one; that in the British suit the American assets might have been recovered from the Executor Nixon, the bill having gone for the *Pennsylvania assets as well as the English.*

However true it may be in cases peculiarly circumstanced that one jurisdiction administering assets may as matter of comity transmit them to a foreign jurisdiction there to be distributed; still the doctrine can have no application here as no assets had been transmitted to England from Pennsylvania, * * * * * and therefore an assumption to distribute the assets in this Country by the High Court of Chancery in England must necessarily have been treated by the Circuit Court (here) as merely void for want of jurisdiction of the subject matter in the foreign court. * * * * (p. 499). The next ground, and that relied on with most confidence in support of the bar, is that John Aspden, of London, and those representing him after his death were

British subjects, residing in Great Britain, and that the contest and only matter litigated in the High Court of Chancery was whether John Aspden, of London, was or was not the heir and consequent devisee of Matthias Aspden (the testator) and that this fact having been found by the decree against the Complainants established and concluded all proof to the contrary of such adjudication directly on the single fact of title and that the representatives of John, of London, could not be heard in another jurisdiction to disavow the conclusiveness of the finding by a Court of their own Government to which they had resorted. * * * * * * * * We have already stated that the Pennsylvania assets stand unaffected and will only add that the assumption that a Complainant or Plaintiff is estopped by a judgment against him from introducing evidence in a second suit and in another country for other property on the ground that the fact of title had been adjudged and concluded by a former judgment or decree, [*thus separating the title from the property,*] is an abstract proposition inconsistent with the due administration of justice and not recognized in our system of jurisprudence or that of Great Britain, and is aside from any question affecting the comity of nations.

Giving the British decree all the force and effect that could be accorded to it if it had been made in a State of this Union, it yet establishes no fact as respects any title to the Pennsylvania assets, nor would by the *rules of evidence be sufficient in separate suits pending in the same Court for different parcels of property even between the same parties.*"

And especially on this and following points.

See Carpenter vs. Strange, 141 U. S., 87, 105 and 6, (likewise cited in Conn. decision).

Also see Coates vs. Mackey, 56 Md., 416.

We do not see how Mr. Clark could have appealed from the South Carolina decision in his individual capacity had it not been to his liking, and that is always one test of its binding

force. 1 Greenleaf on Ev. Sec. 535 cited in Green vs. Bogue, 158 U. S., 478. 503.

First Bap. Church vs. Syms, 51 N. J. Eq., 363, 367.

B.

THE QUESTIONS WERE NOT THE SAME:

—a—

The two questions may have been "like" but were not the same:

The distinction is well shown by the Court of Illinois, in the very similar case of McCartney vs. Osburn, 118 Ill. 403, (1886), where it was claimed that a previous adjudication in the State of the domicile (Pennsylvania) between the same parties on the same questions constituted an estoppel.

> The Illinois Court says in part, p. 410: "Before a former decision can be succesfully invoked as an estoppel in another suit between the same parties, it must appear that the question is the same in both cases, and that the Court, in the former suit, had power and jurisdiction to determine it. The controversy here is about the quantum or extent of interest which the parties respectively have in certain lands in the State of Illinois, and the question to be determined as respects the appellant is whether he has a half interest or merely one-ninth.
>
> "As respects the appellees, the question is whether they are each entitled to a ninth interest or a sixteenth only. It is manifest the Courts of Pennsylvania had no power or jurisdiction to pass upon either of these questions nor did they attempt to do so. It is true they passed upon a question like these, and the decision upon them as an expression of opinion by that Court is entitled to the highest respect, but that is all. While the decision of that Court is persuasive, it is not imperative. Nor does the fact that this Court, in passing upon these questions, may place a construction upon the will different from that adopted by the Pennsylvanian Courts which will

lead to a diversity of interests between the devisees in the two States in respect to the same kind of property make any difference. Such a contingency is the inevitable result of the complete independence of the Courts of the two States in matters within their exclusive jurisdiction.

"The will, through which all the parties claim, is the written evidence of their respective titles and interests in and to the land sought to be partioned and the construction to be placed upon it presents a question of law which this Court must determine for itself. While it was entirely competent for the Pennsylvania Courts to construe the will and determine the rights of the parties to the property there, yet they could make no order, decree or ruling with respect to the legal effect of the will, that would deprive this Court of the right to construe that instrument for itself, so far as it relates to lands in this State. Where a testator, by a single will, devises lands lying in two or more States, the Courts of such States will respectively construe it, as to the lands situated in them respectively, in the same manner as if they had been devised by separate wills."

The same Court, when the same case came up the second time, (121 Ill. 408) again said in part (p. 411):

"The decision in that case, (104 Pa. St. 637), on the plainest principles of law, conclusively settled the rights of the parties to so much of the realty devised as lies in Pennsylvania and to the entire personal estate wherever situated or found, but it did not at all affect the title of the real property outside of that state."

Every will affecting lands in two different states is universally regarded in the administration of the estate, as a dual will; a will affecting the land in one State and a will affecting the land in the other, which for convenience are united in one form. Either may be administered independently of the other. The plaintiff in error will doubtless admit, that if the Connecticut case had been decided first, no subsequent interpretation by the South Carolina Court would have affected the Connecticut land. The Connecticut will would have been distinguished and conclusively construed by the Connecticut Court.

It is not to be presumed that the South Carolina Court intended to go beyond its jurisdiction. Its decree properly related to the powers and functions of the executor only in so far as he had been qualified by the South Carolina Probate Court, to administer such estate as was within that jurisdiction. The only legitimate subject of adjudication in South Carolina was the proper mode of administering upon the estate of Mrs. Clarke, so far as it was or should be in course of settlement before the Courts of Probate of her own State. That Court could only deal with the property which had come or might come under its control. The South Carolina Court did not necessarily attempt to determine or direct the disposition of the Connecticut lands.

The subject matter presented to the South Carolina Court was a determination of what by the laws of South Carolina was the power, duty and estate of the Executor under the will so far as he was qualified under those laws. It was this and nothing more, because the plaintiff could submit to it nothing more. Whether he had any power, duty or estate, with respect to lands situated in another state, depended upon the laws of that other state *and* his appointment or qualification there. There is nothing to indicate that he had even qualified in Connecticut at the time. The will in question is dual in its nature, and any interpretation of its effect upon the land in one state was not necessarily or probably (and certainly not properly) intended to affect the land in the other state. All of which is more clearly shown and sustained in the opinion of the Connecticut Court in this case. (Record p. 19).

—b—

The record of the case in South Carolina as given in the record herein, (p. 14, par. 13) shows that no application was made to that Court for any construction of the will specifically as to the Connecticut land or necessarily with the intent of including that land, neither does its decree expressly include a construction of the will as to that land.

That decision should (and therefore might well) have been intended only to construe the application of the will in the disposition of "all" the land "wheresoever situated" *within the actual control of the Court.* That seems the more probable view of its real intention, when we consider that it contains no reference to or application of Connecticut law, and that it directs an actual conversion of the land by sale and conveyance which it could readily accomplished by its own powers as to the South Carolina land, but clearly could not accomplish as to the land in Connecticut except by the further assistance of the Connecticut Court and Connecticut law. If there is any question at all as to whether the decision was intended to control the disposition of the Connecticut lands, the present writ of error must fail.

Russell vs. Place, 94 U. S., 606, 608.

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There were at least two questions originally involved in the effective construction of Mrs. Clarke's will: Its construction as a will of South Carolina land, and its construction as a will of Connecticut land. The two questions were not the same because the laws of the two states are different.

There were these two distinct questions originally involved, unless the plaintiff in error can successfully claim that a determination that an equitable conversion was intended by the testatrix (as a conclusion by itself, irrespective of its effect) actually accomplishes such a conversion irrespective of the application of any rules of the lex rei sitae determining the sufficiency of the expressions used to accomplish that result; or unless he can successfully claim that South Carolina law can thus finally say what constitutes an effective direction to equitably convert Connecticut lands under the rules prescribed by Connecticut law to control the application of that doctrine in Connecticut.

The plaintiff in error will probably not claim that the South Carolina Court can directly and conclusively determine

the application of the rules of Connecticut law to the disposition of Connecticut lands, whether by way of the construction of a will or otherwise. He certainly cannot make any such claim successfully against the cases elsewhere cited herein as to the jurisdiction of the South Carolina Court.

The determination of an equitable conversion is not the determination of any fact which might be left to a jury, or solely of the meaning of the testatrix, but it is the interpretation of the words used by the testatrix and the determination of the legal effect of those words as so interpreted.

To give the South Carolina decision any effect upon any land it must go far enough to say that the testatrix intended a conversion of the land and sufficiently and properly expressed that intention to effect a conversion under the rules of the controlling law.

And then again, to say that the testratrix intended an equitable conversion, is not sufficient to work such a conversion merely because the controlling laws recognize a doctrine of equitable conversion. The rules governing the application of that doctrine are not necessarily alike in the various states.

"Every state has a right to make its own laws, and its own judicatories are supposed to understand them better than those of a foreign state."

Dougherty vs. Mills, 1 Rich Eq. (S. C.), 335, 339.

The South Carolina Court, the highest authority upon South Carolina law, held regarding Mrs. Clarke's will and the application of the South Carolina doctrine of equitable conversion thereto, that "the provisions of the will as written, when properly construed, develop the conclusion that the testatrix intended that her real property, wheresoever situated and of whatsoever description, should become personalty;" and accordingly decreed as already quoted. That is in effect; that Mrs. Clarke desired an equitable conversion of all her lands and expressed her wishes in proper language to disclose and effectuate them.

While the Connecticut Court, the highest authority upon Connecticut law, held regarding the same will and the Connecticut doctrine of equitable conversion as applicable thereto as follows: (We quote selections from different portions of the opinion.)

> "Equitable conversion results from the existence of a power to convert realty into personalty or personalty into realty, which has not been exercised. There must be both the grant of a power and the imposition of a duty to make use of it." Folio 43.

> "No general residuary devise and bequest can be given such an effect, as respects lands in Connecticut, unless from the whole scheme of the will or the particular language employed, a power of sale is clearly implied. Conversion is effected by sale. Equitable conversion is effected by a power to sell and a duty to sell. It is not enough to manifest an intent that lands shall pass as money, unless there is also, either in terms or by implication, a grant of the means of turning it into money." Folio 49.

> "The question then is no longer simply what wishes the testator has expressed, but whether he has so expressed them as to enable acts to be performed after his decease, by his authority, which will avail to effectuate these wishes according to the requirements of local law. If the will in question worked a conversion, it is because the executor or the trustee could, under its provisions, have executed a deed sufficient under the laws of Connecticut to transfer title to real estate." Folio 50.

> "The heirs-at-law of Julia Clarke are not to be excluded from the inheritance by anything short of a clear implication from the provisions of the will under which her estate was derived. We are unable to find any implication of a power to make such a sale, in favor of Mr. Clarke, either as executor or as trustee." Folio 47.

The plaintiff in error is in the position where he must either admit that the judgment of the South Carolina Court

was limited to a determination of Mrs. Clarke's intention, irrespective of the question of whether or not that intention was properly expressed to accomplish an equitable conversion of Connecticut lands under the rules of law which would govern the application of that doctrine to those lands; or he must claim that the South Carolina Court could by an application of South Carolina law, directly affect the disposition of Connecticut lands. Either position will be equally embarassing to him. Either the questions before the respective Courts were not the same or the South Carolina Court plainly exceeded its jurisdiction.

C.

THE ADJUDICATION OF THE SOUTH CAROLINA COURT WAS NOT WITHIN ITS JURISDICTION AS TO THE NATURE OF THE ACTION, AND AS TO THE RELIEF GRANTED, OR ORDER AND DECREE MADE, AS APPLIED TO THE CONNECTICUT LAND.

The adjudication of the South Carolina Court was not within its jurisdiction so far as it was intended, or is claimed to construe Mrs. Clarke's will in its effect upon the Connecticut land; or to conclusively determine as against Nancy that her mother left only personal estate there.

—a—

Story says in his conflict of Laws:—Sec. 539. "No sovereignity can extend its process beyond its own territorial limits to subject persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity and incapable of binding such persons or property in any other tribunals."

(Cited with approval, Machine Co. vs. Radcliff, 137, U. S. 296).

Sec. 543. "But although every nation may thus rightfully exercise jurisdiction over all persons within its domains, yet we are to understand that in regard

thereto the doctrine applies only to suits purely personal or to suits connected with property within the same sovereignty. For although the person may be within the territorial jurisdiction yet it is by no means true that, in virtue thereof, every sort of suit may there be maintainable against him. A suit cannot for instance be maintainable against him so as absolutely to bind his property situate elsewhere and a fortiori not so as absolutely to bind his rights and titles to immovable property situate elsewhere. It is true that some nations do, in maintaining suits in personam, attempt, indirectly, by their judgments and decrees to bind property situate in other countries, but it is always with the reserve that it binds the person only in their own courts in regard to such property. And certainly there can be no pretence that such judgments or decrees bind the property itself or the rights over it which are established by the laws of the place where it is situate."

Sec. 551. "In respect to immovable property, every attempt of any foreign tribunal to found a jurisdiction over it must from the very nature of the case be utterly nugatory and its decree must be forever incapable of exemption in rem."

Sec. 555. "The grounds upon which the exclusive jurisdiction is maintained over immovable property are the same upon which the sole right to establish, regulate and control the transfer, descent and testamentary disposition of it has been admitted by all nations. The inconveniences of an opposite course would be innumerable, and would subject immovable property to the most distressing conflicts arising from opposing titles, and compel every nation to administer almost all other laws except its own in the ordinary administration of justice."

"It is scarcely necessary to state that in regard to real property, the mode of execution, the *construction*, and the validity of a will must be governed exclusively by the lex rei sitae. The descent of real estate as well as the devise of it, is governed exclusively by the law of the place where the property is situated. It would not comport with the dignity, the independence or the security of any independent State or Nation that these incidents should be liable to be affected, in any manner by

the legislation or the decisions of the Courts of any State or Nation besides itself. This has been a universally recognized rule of the English law from the earliest time, and is so unquestionable, that we should scarcely feel justified in occupying much space in reviewing the cases." I Redfield on Wills 398.

See also: I Jarman on Wills, 1.

"A sovereignty cannot safely permit the title to its land to be determined by a foreign power. Each State has its fundamental policy as to the tenure of land; a policy wrought up in its history, familiar to its population, incorporated in its institutions, suitable to its soil."

Wharton on Conflict of Laws, Sec. 278.

The inquiry, it is laid down, should be; *first*, whether the subject matter was so situated as to be within the lawful control of the State under the authority of which the Court sat; and *secondly*, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide upon the disposition of the property and the Court has acted within its jurisdiction."

Bigelow on Estoppel (1886) p 233.

"The question presented for consideration is, whether the lex loci contractus or the lex loci rei sitae is to govern in the disposal of real estates.

The Court entertain no doubt on the subject; and are clearly of opinion that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate."

U. S. vs. Crosby 7 Cranch 115, 116.

"It is an acknowledged principle of law, that the title and disposition of real property is exclusively subject to the laws of the Country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another."

McCormick vs. Sullivant 10 Wheaton 192, 202.

"No principle is better established than that the disposition of real estate, whether by deed, descent, or by

any other mode must be governed by the law of the State where the land is situated."

Watkins vs. Holman, 16 Peters 25, 57.

"Her (situs) laws exclusively govern in respect to the rights of the parties, the modes of the transfer, and the solemnities which should accompany them."

"*Communis et recta sententia est, in rebus immobilibus servadum esse jus loci in quo bona sunt sita.*"

Suydam vs. Williamson, 24 How. 427-433.

"It is a principal too firmly established to admit of dispute at this day, that to the law of the state in which the land is situated must we look for the rules which govern its descent, alienation and transfer, and for the *effect* and *construction* of conveyances."

McGoon vs. Seales, 9 Wall, 23, 27.

Approved in Brine vs. Ins. Co., 96 U. S., 627, 636.

DeVaughn vs. Hutchinson, 165 U. S., 566, 570.

"The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted.

It is an established principle of law, everywhere recognized, arising from the necessity by the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

U. S. vs. Fox 94, U. S., 315, 320.

"Now in the case of a foreign will devising lands situated in this State is its construction to be governed by the law of the testators domicil, or by that of this state within which the lands devised lie? Laws cannot *proprio vigore* have any extra territorial operation or effect. And in regard to wills of real property, it is well settled by all the authorities, that the construction as

well as the mode of execution and validity of such wills must be governed exclusively by the *lex rei sitae*."

Jennings vs. Jennings, 21 Ohio St., 56, 76.

The same case, in commenting upon the effect of the statute found in so many of the states which makes a will executed according to the law of the place where signed as effectual as if executed according to the laws of the state passing the statute, says p. 79.

"Now if the foreign and the domestic will both stand on the same footing, are both to have the same legal force and efficacy? They must both be subject to the same general law of construction unless the statute provides otherwise. To hold otherwise would be to give an operation and effect to the one which is denied to the other and to make the *construction* and *effect* of the testators will in its operation upon titles to lands in this state depend upon the law of another sovereighty. We cannot believe that such was the intention of the Legislature."

See also Watts vs. Waddle, 6 Peters, 389, 401.

"It is not only the title to real property which is governed by the *lex loci rei sitae* but also the effect and construction of the instrument conveying it."

Butler vs. Green, 65 Hun., 99, 107.

"The appellant is not concluded or affected by the decision of the Probate Court in Connecticut. The transmission of the title to real estate situated in this State, either by testament, by conveyance inter-vivos, or by intestacy, is regulated by our own laws.

Whether the judgments of the Court of Probate in Connecticut are confined to personalty, or assume to determine upon devises of real property, they have no effect upon the title of real estate here."

Peck vs. Carey, 27 N. Y., 9, 11.

"Nothing is better settled than that the law of the place where real and immovable property is situated exclusively governs in respect to the rights of parties and

the modes of transfer and distribution. When the property is real estate the *lex rei sitae* controls."

Smith vs. Smith, 174 Ill., 52, 58.

See also: McGarvey vs. Darnall, 134 Ills., 367, 372.

"The law is well settled that a title to, or interest in lands must be acquired according to the law of the place where the lands are situated. It is that law which determines the force and effect of the instrument, be it a deed, will or contract."

Richardson vs. DeGiverville, 107 Mo., 422, 433.

"Was the title complete to Mr. White according to the laws of Georgia? The laws of Tennessee had nothing to do with it; they could not make it good if it was bad—they cannot make it bad if it be good. If by our law White takes without conditions, the law of Tennessee cannot impose a condition. The land passes according to our law, and this is the necessary incident to the sovereignty of the State over the land within its borders."

Kerr vs. White, 52 Ga., 362, 370.

"Her power of disposition and dealing with it (Mississippi land) are by our laws impressed upon the property itself. As to none of these things has the law of Louisana (the domicile) the slightest influence. * * * The principle of comity does not require a State to regard the laws of any other State so far as they may affect contracts in relation to real estate situated in the former State."

Frierson vs. Williams, 57 Miss., 451, 463.

"According to the maxim extra territorium jus dicenti impune non paretur, it would certainly seem that no sovereignty could claim to bind or change the right to real or any immovable estate lying without its territorial limits, and had therefore no reason to expect that such a decree, if made, would be regarded by the tribunals of the State rei sitae. In short it cannot be treated otherwise than as a mere nullity by those tribunals, consistently with a proper respect for their own authority and

the obligation which they owe to their own severeignty to maintain all its rights unimpaired."

Williams vs. Maus., 6 Watts, Pa., 278, 279.

"The Courts of one States are without jurisdiction over title to lands in another state."

Nelson vs. Potter, 50 N. J., L. 324, 325.

See also:

Lamar vs. Scott, 3 Strob, S. C., 562.
Hawley vs. James, 7 Paige Ch., 213, 219.
Davis vs. Headley, 22 N. J., Eq. 115.
Sedgwick vs. Laflin, 10 Allen, 430, 433.
Brock vs. Frank, 51 Ala., 85, 88.
Danner vs. Brewer, 69 Ala., 191, 203.
Thomas vs. People, 107 Ills., 517, 524, 5.
Cantu vs. Bennett, 39 Texas, 304, 309.
Applegate vs. Smith, 31 Mo., 166.
Elliot vs. Minto, 6 Madd., Ch. 16.
Bovey vs. Smith, 1 Vernon, 84.
Robinson vs. Bland, 2 Burr, 1077, 1079.
Brodie vs. Barry, 2 Ves. & B, 127.
Freke vs. Lord Carberry, L. R., 16 Eq. Cas. 461, 465-6.
Harrison vs. Harrison, L. R. 8 Ch. Appeal Cas. 342.

And especially see the following groups of cases:

Penfield vs. Tower, 1 N. Dak., 216, (1890).
Lee vs. Tower, 124 N. Y., 370, (1891).
In re Towers estate, 49 Minne. 371, (1892).
Three cases concerning the same will.

Hale vs. Hale, 137 Mass., 168, (1884).
Hobson vs. Hale, 95 N. Y., 588, (1884).
Hale vs. Hale, 125 Ill., 399, (1888).
Three cases concerning the same will.

Wurtz vs. Page, 19 N. J., Eq. 365, (1869).
Page's Estate, 75 Penn. St., 87, (1874).
Two cases concerning the same will.

Osburn's Appeal 104 Penn. St., 637, (1883).
McCartney vs. Osburn, 118, Ill., 403, (1886).
McCartney vs. Osburn, 121, Ill., 408, (1887).
Warner's Estate, 130 Penn. St., 365, (1889).
Four cases concerning the same will.

White vs. Howard, 46 N. Y., 144, (1871).
White vs. Howard, 38 Conn., 342, (1871).
Two cases concerning the same will.

—b—

"These cases (referring to the case of Watts vs. Waddle, 6 Pet. 389, cited elsewhere herein and similar cases) rest upon the rule, which is firmly established, that the Courts of one State or Country are without jurisdiction over title to lands in another State or Country. The clause of the Federal Constitution which requires full faith and credit to be given in each State to the records and judicial proceedings of every State is subordinate to this rule, and applies to the records and proceedings of the Courts only so far as they have jurisdiction."

Lindley vs. O'Reilly, 50 N. J. L. 636, 642.

"This is so because the question is one of power, and power is created or withheld by the law of the place where the land lies."

Swank vs. Hufnagle, 111 Ind. 453, 455.

"Courts should not render judgments which cannot be enforced by any process known to the law."

Johnson vs. Mallory 74 Cal. 430, 432.

The judgment of the South Carolina Court, so far as it was intended to affect Connecticut land by determining that the will lawfully directed and empowered the executor to sell and convert that land, was accordingly beyond the power of the South Carolina Court to render, because it was confessedly beyond its power to enforce.

As expressed by the Connecticut Court in its opinion in this case:

> "Courts sit to determine causes and to enforce their determination. It is a general rule that what they cannot enforce they cannot decree. So far as concerns the extra territorial effect of foreign judgments, this rule is a principle of international law." (Folios 38 and 39).

The South Carolina Court had no power to enforce its decree as to the Connecticut lands and hence no jurisdiction over that question.

It is an established proposition that where a Court cannot enforce its decree as to the subject matter concerned, that subject matter is beyond its jurisdiction.

> "The rule is now well established * * which as already explained, forbids a Court to give judgments which it cannot render effective, or which it can render effective only by interfering with the authority of a foreign sovereign or the jurisdiction of a foreign court."
>
> "The undoubted rule in short is, 'that if a Court pronounces a judgment affecting land out of its jurisdiction, the Courts of the country where it is situated, and it is presumed also the Courts of any other country are justified in refusing to be bound by it or to recognize it; and this even if the judgment proceed on the lex loci rei sitae.'"
>
> Dicey on Conflict of Laws (1896) pps. 215, 365.

—c—

The action in South Carolina was brought to determine the effect of the will upon the land of the estate, and not to determine the relations of the parties to each other, or primarily their individual relations to the land, but how the will disposed of the lands. The disposition of the lands was the subject matter of the action and not merly an incident to the settlement of personal rights or relations.

The action was not, so to speak, in personam, to determine any right or demand or claim of one party against the other; or to determine any agreement between them, or to compel right action by one towards the other, or to protect one from the other. This was not a case of election by an heir or widow, or of a power of appointment under a will, or of compelling a party to carry out the views of the Court by an individual conveyance, but it was an action, as it were, in rem—to determine the effect of the will in question upon the lands concerned—to decide how those lands were disposed of by that will.

> "Judgments in rem are adjudications pronounced upon the status of some particular matter by a tribunal having competent authority for the purpose. They decide and determine a status or make a final and conclusive transfer of property."
>
> 1 Bailey on Jurisdiction, Sec. 212, p. 224.

See also:

> Thomas vs. The People, 107 Ill., 517, which seems to regard the administration of a dead man's estate as a proceeding in rem.

The Connecticut lands were not in South Carolina, nor could they be brought there by consent or otherwise. Neither could that Court by any decree or penalty authorize or effect a sale thereof.

> Sometimes: "A Court of Chancery having jurisdiction over the person who has the legal title to lands in another State, may by a decree, force him to convey to the holder of the equitable title, for whom he stands as a trustee; but it cannot by its decree, or through a deed of a Commissioner pass that title."
>
> Watts vs. Waddle, 6 Peters, 389, (Syllabus).

This was not that kind of a case; neither was there any attempt to authorize or direct any one but the executor to make the sale.

In such cases the holder of the legal title is acted upon personally and compelled to give such a deed as the laws of the

situs require. He already has the power to convey under those laws and is simply compelled to exercise that power by the coercion of the foreign state. There can be no question but that the Connecticut Court could pass upon the form and sufficiency of that deed. Were this case in that category of causes there would still be a fatal lack of jurisdiction, in that the executor, the one authorized and directed to sell by the South Carolina Court, did not hold the title to the Connecticut lands, and could not, if he would, convey them unless especially given that title and power under the laws of Connecticut, and whether he has that power and exercises it in due form, is for the Connecticut Courts to decide.

In the one case, the individual already has all needed power to convey under the laws of Connecticut, and whether he acts of his own motion or by pressure from the South Carolina Court does not affect the legality of his action; but in the other case, (which is the one in question here), the only power of sale and conveyance held by the excutor is the one construed for him by the South Carolina Court, while whether or not that power conforms to and is sufficient under the laws of Connecticut, is manifestly for the Courts of Connecticut alone to say.

> "But neither the decree itself, nor any conveyance under it except by the person in whom the title is vested, can operate beyond the jurisdiction of the Court."
>
> Watkins vs. Holman, 16 Peters 25-57.

> "It is not in the power of one State to prescribe the mode by which real property shall be conveyed in another. This principle is too clear to admit of doubt."
>
> Watts vs. Waddle 6 Peters 389-400.

> "The real estate was situated in Tennessee and governed by the law of its situs, and while by means of its power over the person of a party a Court of Equity may in a proper case compel him to act in relation to property not within its jurisdiction, its decree does not oper-

> ate directly upon the property nor affect the title, but is made effectual through the coercion of the defendant, as, for instance, by directing a deed to be executed or cancelled by or in behalf of the party. The Court 'has no inherent power, by the mere force of its decree to annul a deed or to establish a title.'"
>
> Carpenter vs. Strange, 141 U. S. 87, 105.

The South Carolina Court could not by any pressure upon the executor, or by any help from him, accomplish the actual legal transfer of the lands in question. No transfer could be made except by a grantor and a deed authorized to act and approved in form by the laws of Connecticut, and the South Carolina Court could not give that authority or pass upon the sufficiency of an attempt to comply with those laws.

Then again: had this been a proper case for the exercise of a power in personam, and had the South Carolina Court attempted to require the holder of the legal title to dispose of the land in accordance with its decree, that decree would not have bound the Connecticut Court until it had been complied with and the transfer actually made, as it has not been in this case:

> "Until such conveyance or release has been executed, the lien of the mortgage on the immovable property embraced in it, situated in this State, remains unaffected, unless the Court in Ohio was clothed with power enabling it to affect the Status of real estate outside of the State which created the Court, by a decree operating in rem. It is elementary that no sovereignty can extend its process beyond its own territorial limits, to subject persons or property to its judicial decisions. Every attempted exertion of authority of this sort beyond its limits is a mere nullity, incapable of binding such person or property in any other forum. A suit cannot be maintained against a person so as absolutely to bind his property situated in another sovereignty, nor so as absolutely to bind his right and title to immovable property whose situs is elsewhere. * * * *

Indeed no principle is more firmly established than that the disposition of real estate, whether by deed, descent or any other mode, must be governed by the laws of the State where the land is situated."

Lynde vs. C., C. & I. Ry. Co., 57 Fed. Rep. 993, 996.

—d—

But it was strenuously maintained before the Connecticut Court in support of the authority of the South Carolina decision that the subject matter of the South Carolina case was not the disposition of the Connecticut lands but merely the interpretation of Mrs. Clarke's will concerning all of her real estate.

This claim however discloses the same fatal want of jurisdiction, even if the interpretation of the will as a whole is, for the sake of the argument, deemed to be within the power of the South Carolina Court.

The South Carolina judgment attempted to interpret the will and to adjudge that it specifically authorized and directed the sale and conversion of the lands concerned. If this was a direct attempt to both ascertain the wishes of the testatrix and decide that the will gave a sufficient power and authority to carry out those wishes as to theCon necticut lands, it was a direct disposition of those lands by the South Carolina Court and therefore clearly beyond the jurisdiction of that Court under the cases already cited; while, if the judgment was merely an attempt to ascertain the wishes of the testatrix—merely a determination that she desired a conversion of the lands, and intended to authorize and empower the executor to sell them for that purpose—the judgment did not bar the further consideration by the Connecticut Court of the sufficiency of the language used to carry out those wishes, any more than an express power and order in the will to the executor to sell and convey would have barred the Connecticut Court from determining its sufficiency there. The executor did not hold the title and the judgment could not be carried out, unless, as in the case of a conveyance or deed by the executor, the power of sale was

authorized by, and sufficient under, the laws of Connecticut, as determined by the Courts of Connecticut.

Any attempt to support the South Carolina decision as to Connecticut lands, by claiming that it merely determined the interpretation of the will, either goes too far or not far enough to be in effect a conclusive determination of the disposition of those lands.

The very term "Equitable Conversion" which is admittedly applicable to the result, which the South Carolina Court attempted to accomplish, shows that that result includes more than a mere discovery of the wishes of the testatrix. It shows that a court of Equity has still to apply its rules to the form of words which clothe those wishes and determine what they effect.

Then again, the interpretation of the will was not the question at issue in the South Carolina case except as it affected the rights of the parties to some specific property. A mere interpretation of a will could not be a cause of action or the subject matter of an action by itself. Such an interpretation can be considered only in connection with and to determine the rights of parties to some property in question; and no judgment would be complete or effective unless it determined those rights.

> "We have already stated that the Pennsylvania assets stand unaffected and will only add that the assumption that a complainant or plaintiff is estopped by a judgment against him from introducing evidence in a second suit and in another country for other property on the ground that the fact of title had been adjudged and concluded by a former judgment or decree, *thus separating the title from the property*, is an abstract proposition inconsistent with the due administration of justice and not recognized in our system of jurisprudence or that of Great Britain and is aside from any question affecting the comity of Nations."
>
> Aspden vs. Nixon, 4 How., 467, 499.

The disposal of the South Carolina lands was a material part of the question before that Court; and either the disposal of

the Connecticut lands was likewise a part of the question or they were not intended to be controlled thereby. If it is claimed that a construction as to the South Carolina lands must be conclusive in all jurisdictions as to the lands situated in those jurisdictions as well, it will be needful for the plaintiff in error to further claim that the South Carolina Court can conclusively determine, under its own laws, the legal effect of a testators expression concerning Connecticut lands, which under the rules and precedents already referred to is quite beyond its power to determine or enforce.

Even if we should consider, for the sake of the argument, that the Court of the domicil may conclusively interpret a will, it appears that the South Carolina Court in this case passed the limits of every power of interpretation and after declaring what seemed to it to be the wish of the testatrix, attempted to further judicially construe the effect upon the Connecticut land of the words in which that wish was clothed—that is; 1st, to determine or interpret the testator's wishes; and 2d, to give the expression of those wishes the legal effect upon Connecticut lands which the Court of South Carolina thought it ought to have. An attempted construction which is a very different thing from interpretation, and quite beyond the jurisdiction of any foreign Court.

> As said by the Connecticut Court in the case of Glover vs. Stillson, 56 Conn., 318. "There are two methods of construing wills: One is to ascertain the intention of the testator and give effect to that so far as it is consistent with the policy of the law." * *
>
> "The other is to apply legal rules and construe the language used accordingly."

If, as appears in this case, the South Carolina Court applied the legal rules governing its own decisions and construed the language of the will accordingly, it clearly exceeded its jurisdiction, so far as the Connecticut lands were concerned, by attempting, not a discovery of the wishes which prompted the

language used, but a construction of the legal effect of that language on Connecticut lands under South Carolina law.

If the Court of South Carolina is given the most liberal powers, of interpretation accorded anywhere, it could only *interpret* in the limited sense referred to; it could not import such a construction as it attempted to enforce.

> "Interpretation properly precedes construction, but it does not go beyond the written text. Construction takes place where texts to be interpreted and construed are to be reconciled with the rules of law, or with compacts or constitutions of superior authority, or where we reason from the aim or object of an instrument, or determine its application to cases unforseen and unprovided for."
>
> 2 Parsons on Contracts, 491 (a).

> "Interpretation differs from construction in that the former is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to deprive from them the same idea which the author intended to convey.
>
> "Construction, on the other hand, is the drawing of conclusions respecting subjects that lie beyond the direct expressions of the text, from elements known from and given in the text; conclusions which are in the spirit, though not within the letter of the text."
>
> Cooley, Constitutional Limitations, 6 Ed. p. 51.

> "The office of interpretation is to bring sense *out of* the words used, and not bring a sense *into them*."
>
> McClusky vs. Cromwell, 11 N. Y., 593, 602.

The question is not; 'what is the meaning of any local reference? Or, 'with whom was the contract made?' Or even, 'what property is referred to?' 'But, how does the language used affect Connecticut lands?', 'What interest in legal effect, does it dispose of therein?'

By Mrs. Clarke's will, her trustee was at the time stated to pay over the whole sum to Nancy, or if she married, one-half of her share was to be paid to her then, and the other half at the time first stated.

Assuming that the South Carolina Court could even go so far as to say that Mrs. Clarke meant by "the whole sum," all of Nancy's share, and by "to pay," a transfer of that share, and in using the words "pay" and "sum" had in mind personal property, that nevertheless falls far short of giving that court power to say that the language used effected an out and out conversion immediately upon her death of all her property in every state—as well that given her husband at once as the shares to be transferred to Nancy and Julia long afterwards—and thus to fetter the Connecticut Courts by a conclusive determination which they must recognize and enforce in spite of its remarkable character and entire repugnance to Connecticut rules of construction.

The contention is, that it was of no moment whether such an out and out conversion was fairly and properly implied or whether such a conversion would be implied under the South Carolina law from less imperative and unequivocal expressions than in Connecticut, but that the Connecticut Court must now agree that such a conversion was sufficiently and imperatively directed by the language of the will to satisfy its rules.

The Connecticut Court could require apt words of meaning and its own form of conveyance in any transfer of that property by sale inter vivos. Yet it was asked to enforce in this case, with its eyes closed, the decision of the South Carolina Court that Mrs. Clarke's language meant and conclusively required a sale and conversion of all her real estate.

If a power of sale had been actually expressed in the will, could not the Connecticut Court pass upon the sufficiency of that power of sale as so expressed? Would it have to accept the opinion of the South Carolina Court as to such sufficiency.

And may not the Connecticut Court determine the sufficiency of the power of sale in this case, where it exists if at all by implication only?

The Court of South Carolina could not take jurisdiction of a will for the purpose of determining whether an expressed power of sale of Connecticut lands was properly worded, whether it did this by way of determining the testator's intention or to directly transfer the land.

Suppose the South Carolina Court had held that Mrs. Clarke intended Julia's share should not vest until she was twenty-five, and that as she had died sooner it would go to the survivor, Nancy; or, (if the words per capita had been omitted), that the devise to the husband and the two children equally, was intended as a devise otherwise than per capita; or, if the estate had been left to the husband during his life, with power to use the principal if he deemed it needful for his support, with remainder of balance over to the children, that it was intended as a devise in fee to the husband; and suppose the Connecticut Court applying its own law would determine in the respective cases; that the share vested in Julia at her mother's death, that the division was intended to be per capita, and that it was intended the husband should take a life estate only, with a limited power of application of the principal; would the Connecticut Court be confined to an execution of these South Carolina decisions as to the Connecticut lands, with no power to exercise its own judgment in the premises? Yet these would be as truly questions of interpretation as is the question: Did Mrs. Clarke, by the language she used, intend and properly direct an immediate out and out conversion and sale of her whole estate?

Then again, if the South Carolina Court may take jurisdiction to interpret a will of Connecticut lands, and in effect conclusively order a sale of those lands, we might easily have this impossible situation: There might have been other children in the case, residents of Connecticut, who were not before the South Carolina Court, and the executor might be bound under the South Carolina decision to sell all of the Connecticut lands and distribute the proceeds, and might be required to do so by the parties before that Court, while he would be equally required by the Connecticut decision and the parties there, to

enforce a distribution of the land itself. It would be difficult to enforce both decisions or to make an equal distribution to all the heirs under such circumstances.

There can be no doubt, under the authorities, but that it is for the Court of the situs to say whether or not a general devise includes the after required real estate. And yet the implication here of an out and out conversion, was no more truly than that a question of the meaning and intent of the testatrix. The language in each case might be construed either way; it is the law which gives it its especial intent and force.

Must the Connecticut Court confine itself to giving effect to an "*intent*" imputed by the South Carolina Court under South Carolina law.

It is permissable to admit parole evidence to clear up latent ambiguities as to the persons or things referred to in a will, but it has always been deemed improper to admit such evidence to amplify or qualify or explain the legal effect intended by the testator for the language used.

And in the same way, if the Courts of other States are permitted to imply or impute or construe the legal effect intended to be acomplished by the language used in a will, or are permitted to add to that language so as to make it express what those Courts conclude under their construction the testatrix wished to accomplish, there would be very little control left to the Connecticut Courts over the Connecticut lands owned by non-residents.

Would the plaintiff in error claim that the South Carolina Court has jurisdiction to determine whether a will has been properly executed under the Connecticut law so as to pass lands in Connecticut? How different in principle would this be from trying to determine the construction of a will of Connecticut lands; or that a sale and conversion of the Connecticut lands is imperatively directed in the will?

Is a state more concerned with the execution and proof of a foreign deed or will than with the interpretation and construction of its provisions?

The form cannot be of more importance than the substance, or more intimately concern the sovereignity and control of the State.

If a resident of Connecticut were to make his will in South Carolina, the Connecticut Court might admit evidence of his surroundings in explanation of the meaning of his words, but certainly would not permit such an importation of construction by the South Carolina Court as is claimed in this case.

If a resident of South Carolina should give a fellow citizen a single deed embracing two tracts of land, one in South Carolina and one in Connecticut, without any words of inheritance, and if in an action brought by the grantee involving the construction of the deed, a Court there should hold that it was intended to and did convey a fee in both parcels, would that judgment bind the heirs or attaching creditors of the grantor, or even the grantor himself in Connecticut, as to the Connecticut land, even if the parties in the two cases were the same or their privies in title. Could the South Carolina Court conclusively determine that the deed intended to and did convey the fee of the Connecticut lands?

In the case at bar the South Carolina judgment does not act or pretend to act upon Nancy Clarke personally; it does not bid her to do or refrain from doing anything; it simply says that certain lands in several states, including Connecticut, (which lands in Connecticut would otherwise go to her.) were intended by the testatrix to be sold and converted into personalty, and that the executor is empowered to so sell and convert them, despite the fact that there is no such power in the will under the Connecticut law.

The two cases above are analogous. Neither acts upon the person, but both determine directly by a South Carolina Court and South Carolina law, the title to Connecticut land.

How can this conclusion of the South Carolina Court as to the Connecticut land be within its jurisdiction, in either case?

The language of the will is not a peculiar form of South Carolina English, but general every day English such as we

all use; nor are there any latent ambiguities requiring local light for their elucidation. The construction which the plaintiff in error claims to have established for the will is merely a determination of the effect under the common law of those words wherever and by whomsoever used.

There is a very great difference between interpreting a provision by reference to terms or idioms of local significance, or even by reference to a local construction of expressions which have acquired a settled and well understood meaning under local law, and interpreting that provision by rules of local construction applied for the first time to the expression used.

The question here was not even whether Mrs. Clarke's expression had a settled and well understood meaning in South Carolina which we might suppose she knew and therefore used the words with that in mind, but whether the South Carolina Court meeting these expressions in such a connection for the first time, could conclusively determine their legal effect from what it concluded the South Carolina law was or should be. It cannot be claimed that the South Carolina precedents were sufficiently in point to demonstrate Mrs. Clarke's actual meaning when her will was made. No reasonable person wishing to direct an out and out conversion would have risked it with such expressions under any of the South Carolina precedents then existing.

A principal reason given for the claim of the plaintiff in error is, that a will should bear the same interpretation everywhere, and that that interpretation should be based upon the local surroundings of the testator. It would certainly be more convenient if the laws of all the States were alike; but until they are, a testator must either use words of conveyance appropriate at the situs, or the muniments of title in each State must be subject to as many varying constructions as there are different state laws, to the utter confusion of our records and the despair of those concerned.

If it were so that there can lawfully be but one construction of a will, that ought to be by the laws of the domicil, (if

there is any reason for the rule,) and it should make no difference whether the Courts of the domicil acted first or not. Accordingly the Connecticut Courts would have to apply the laws of other States in determining the effect of all foreign conveyances of Connecticut lands, and conveyancers and counsel must needs become prodigies of learning.

Besides the utter subversion of local control over Connecticut lands, such a course would soon spread confusion among all the titles in the State. It would seem as though it were far better to insist upon the testator's learning something of the laws under which he holds his lands, and upon his disposing of them under their local conditions, just as he would adapt any buildings on them to their local surroundings.

The testator knows his lands are situated in different States which are independent sovereignties, and he certainly ought to know that their laws are different. One of the first things an owner realizes is the difference in governmental control. He knows those lands are not within his home surroundings or subject to the taxes, customs or control of his domicil. He knows he is not describing local persons or things, but is disposing of lands which are in different governments, and he must be presumed to have made his dispositions with reference to the laws of those governments. Even the South Carolina Court said that Mrs. Clarke must be presumed to have known what the laws of Connecticut were.

If a testator tries to make one disposition answer for lands in several States, he must see to it that the language used is sufficient and appropriate to accomplish his purposes in each of those States.

If it be objected that an inequality of benefits may result to the beneficiaries of the estate under the different laws, and so the intention of the testator be frustrated, that would be his own fault, and a lesser evil besides. He should either know something about his property, or bring it all under his wing. It is inevitable that properties differently situated, even in the same State, should be subject to different laws, burdens, obligations and relations.

No one will pretend to say that intestate lands are to be distributed according to the laws of a foreign domicil. Yet such distribution is in effect but a will by the State for the owner, and will cause the same inequality of benefits, no matter how well satisfied the owner was with the rule of his domicil or how fully he believed his lands would descend thereunder.

A testator, in disposing of his lands in other States, knows that he is disposing of an immovable part of another government, and should be required to act accordingly or abide the result.

As said in Bispham on Equity, 1 Ed. Sec. 312: "The question' (of conversion as in this case), 'always is, did the testator intend to give money or to give land, and has that intention been *sufficiently expressed.*" This means "sufficiently expressed" *under the laws of the situs*, and while the high character of the South Carolina Court would make its decision upon that point persuasive, it could not be conclusive

Then again, there is no common law right of transmission by will. A will is a statutory conveyance permitted and effective only by the express consent of the State concerned. It is for that State alone to say whether its land shall pass by will; how such wills shall be executed and proved, and, (as a necessary corollary), what force and effect shall be given to their language. The fact that the lands of two States are disposed of by the same testamentary provision, cannot give any greater jurisdiction or control to one State over the land in another, than it would have, had the provision affected only the foreign land; and it seems to be a self evident truth, that both the independent sovereignty of the State over its own lands, and its independent control of their transmission by will, give it an exclusive power to determine the legal effect of every such attempted transfer.

Here again we quote from the opinion of the Connecticut Court in the case at bar. (p. 29, folio 40).

> "Upon the death of a land owner, whether a citizen of the State or not, whoever takes title by succession,

takes it because these laws concede it to him, not as a right but as a privilege. (Citing in support, Mager vs. Grima 8 How. 490). * * * * * a devisee takes by an artificial perpetuation of a testator's will, which survives him for that purpose with a vitality conferred and created by positive law. By that same law the form of its expression is prescribed and limited. Title to land can be conveyed under a testamentary power, only when such a conveyance is sufficient under the laws of the territorial sovereign."

The leading case of Birtwhistle vs. Vardill 7 Clark and Finelly 895, cited by the Conn. Court, was twice argued at length in the House of Lords between 1830 and 1840, and finally unanimously decided. It holds that a child born out of wedlock in Scotland of Scotch parents and subsequently legitimitized by Scotch law cannot take as heir the land of its father in England. That is to say, a person declared by the law of the domicil to be a legitimate child does not necessarily take what legitimate children take in England.

Had it been possible for the South Carolina Court to take jurisdiction of the will as to the Connecticut lands it could have done so only through jurisdiction of the parties. While it may have taken jurisdiction of the parties properly as to the South Carolina lands, it could not have taken or continued that jurisdiction as to the Connecticut lands unless by consent, and an infant cannot subject to any tribunal her rights of property by consent.

The element of consent would have been necessary to bind the parties as to the Connecticut land and the infant could not give any such consent.

"It has been settled by the decisions of this Court * * * that an infant is incapable of making himself a party to an action by accepting service of a summons so as to be bound by a judgment therein."

Whitesides vs. Barber 24 S. C. 373. (376).

And even if Nancy Clarke could have lawfully consented to the action taken, the Connecticut Court might properly refuse to be bound thereby because of the considerations of public policy involved.

> "No man can put himself in the place of the sovereign and make the adjudication of a Court valid by ratifying an unauthorized exercise of power by its agent, when the law of the land, which is the agents power of attorney, declares that the Court has no authority to render the judgment."
>
> Springer vs. Shavender 118 N. C. 33, 45, (1896).

> "If a State provides that no title shall pass to property within its borders except on certain conditions, such provision cannot be over-ridden by the law of another State which parties domiciled there may be held to have adopted."
>
> Cole vs. Cunningham, 133 U. S., 107, 128.

State sovereignty and state rights are no more jealously or zealously guarded in Connecticut than in South Carolina, as the recent past has abundantly shown; neither can it be said that Connecticut yields less readily or less fully to the limitations of the Federal compact; but in the disposition of the land which is its birth right, Connecticut has never yielded to any state or compact any power or right whatsoever, whether the attempt was made to directly interfere, or, by construction to create a title which should be recognized by Connecticut law.

V.

SOME CONSIDERATIONS WHICH WOULD BE PERTINENT IF THE PROPERTY WERE IN FACT PERSONALTY.

The decree of the Connecticut Court of Probate, (p. 7, folio 20) shows that that Court considered (1) the inventory as filed, (2) the will of the mother, and (3) the South Carolina decis-

ion. As already stated there is nothing to indicate that that decision was claimed to work an estoppel under the Federal Constitution, or to be anything more than a precedent for a similar construction of the will by the Connecticut Court. Moreover, as already shown, (p. 4 of this brief) that Probate decree is still the fundamental and only adjudication determining how Julia Clarke's estate in Connecticut shall be distributed. While it is of course a fair inference that the Probate Court rejected the South Carolina precedent and held that the real estate remained unconverted and accordingly "ascertained" Nancy to be the only heir, still if the property had been in fact personalty and that personalty were to be distributed by the law of the situs, Nancy would have taken it just the same.

The Connecticut statute controlling the distribution of property, both real and personal, is as follows:

> "If there be no children or any legal representatives of them then after the portion of the husband or wife, if any, is distributed or set out, the residue of the estate shall be distributed equally to the brothers and sisters of the intestate of the whole blood and those who legally represent them."
>
> Gen. Stats. (1888) Sec. 632.

Now we claim that a Connecticut Probate Court has the power, if it chooses so to do, to order the distribution of a non-resident intestate's personalty situated in that State according to the Connecticut Statute of distribution.

> "Every State and Sovereignty possesses the power of regulating the manner and term upon which property, real or personal within its dominion may be transmitted by last will and testament or by inheritance and of prescribing who shall, and who shall not be capable of taking it."
>
> Mager vs. Grima, 8 How. 490, 493.

> "There is no little conflict of authority on the general question as to how far the transfer of personal property

by assignment or sale made in the country of the domicil of the owner will be held to be valid in the Courts of the Country where the property is situated when these are in different sovereignties.

The learned author of the commentaries on the Conflict of Laws has discussed the subject with his usual exhaustive research and it may be conceded that *as a question of comity*, the weight of his authority is in favor of the proposition that such transfers will generally be respected by the Courts of the Country where the property is located although the mode of transfer may be different from that prescribed by local law. * * * * * But after all this is a *mere principle of comity* which must give way when the statutes of the country where property is situated or the established policy of its laws prescribe to its courts a different rule."

Green vs. Van Buskirk 5 Wall 307, 311. (See this case at length).

"Any other rule would destroy all safety in derivative titles and deny to a State the power to regulate the transfer of personal property within its limits and to subject such property to legal proceedings."

Green vs. Van Buskirk 7 Wall 139, 148.

"Undoubtedly the fiction of law that the domicil draws to it the personal estate of the owner wherever it may happen to be yields whenever it is necessary for the purposes of justice that the actual situs of the thing should be examined and always yields when the laws and policy of the State where the property is located invalidate a transfer even though valid by the law of the assignor's domicil in which State it was made."

Cole vs. Cunningham 133 U. S. 107, 128.

It accordingly seems to us worth while to consider whether the Probate Court did not make an order which in any event it had the *actual power* to make whatever the nature of the property in question and however lacking in comity the order might be. If this be so, who shall say that the Probate Court was uninfluenced by that consideration, and why should its order be now disturbed?

We know of no provision of the Constitution which requires the State of Connecticut to distribute any property within its borders under any other than its own laws of distribution as determined by its own Courts, even if every principal of inter-state comity be thereby violated.

VI.

CONCERNING SOME OF THE AUTHORITIES RELIED ON BY THE PLAINTIFF IN ERROR.

The plaintiff in error has not heretofore cited authorities in support of a contention that the parties and the questions were the same in the South Carolina and Connecticut cases. We accordingly cannot anticipate and consider the authorities which he may cite upon those points.

He has however cited authorities in support of the contention that a will, whether of real or personal property, is to be construed by the law of the domicil. In as much as it will doubtless be claimed that these authorities show that the South Carolina Court had jurisdiction to determine the effect of Mrs. Clarke's will upon Connecticut land, we will briefly consider them by way of anticipation Some of them are also referred to and distinguished in the opinion of the Connecticut Court,

1. 2 Greenleaf on Evidence, 13 Ed., Sec. 671.

> "In the interpretation of wills, whether of movable or immovable property, where the object is merely to ascertain the meaning and intent of the testator, if the will is made at the place of his domicile, the general rule of the common law is, that it is to be interpreted by the law of that place at the time when the will was made. * * * Recourse is to be had to the law of the place where the will was made and the testator domiciled." (Citing as its authority Story on Conflict of Laws next below).

"Where the will of personal property is made in the domicile of the testator, the general rule of the common law is, that it is to be construed according to the law of the place of the domicile in which it is made.

The same rules of construction will generally apply to wills and testaments of immovable property, unless indeed it can clearly be gathered from the terms used in the will, that the testator had in view the law of the place of the situs, or used other languages which necessarily referred to the usages and customs or language appropriate only to that situs."

Story on Conflict of Laws, sec. 479 a, h.

Both of these authors thus refer the interpretation and construction of the will to the law of the place where the will *was made* and the testator domiciled. But Mrs. Clarke's will was made in Bridgeport, Connecticut, where the bulk of her estate was situated, and where she had just derived all of her rights thereto under a Connecticut will and Connecticut laws, from her grandfather, a resident of Bridgeport. Moreover her will was made under the advice and with the assistance of Connecticut counsel. It is a fair presumption at least, that it was made with especial reference to Connecticut laws and the disposition of her Connecticut land thereunder.

"For purposes of construction it is always legitimate to consider the time when, and the circumstances in which the will was made, and we think the law under which it was made is one of those circumstances."

State vs. Atkinson, 144 Mass. 564, 569.

Approved in Mullen vs. Reed, 64 Conn., 240, 247.

And we also add from a later authority on the conflict of laws:

"It is said by Judge Story (479 h) that the same rules of construction [concerning wills of personalty] 'apply to wills and testaments of immovable property; unless indeed it can be clearly gathered from the terms used in the will that the testator had in view the law of the

> place of situs or used other language which necessarily referred to the usages and customs or language appropriate only to that situs,' But this is scarcely reconcilable with the general position that in respect to immovables the law of the situs controls.
>
> That law may say: 'It appears from the structure of the will that the testator wished to apply the law of his domicile,' and the law of the situs may for this purpose adopt the law of the domicile, or on similar reasoning the lex loci actus, or the law of the testator's temporary as distinguished from that of his last domicile. But this will be at the election of the Courts of the situs. The law that they impose must be decisive."
>
> Wharton on Conflict of Laws, Sec. 597.

It will also be noticed that the two authors above (Greenleaf and Story), do not use the same words to convey their meaning, and there is therefore with them the same confusing indefinitness as to the application of their suggested qualification of the rule which will be met with in the expressions elsewhere found upon the same point.

Greenleaf says, (though he seems to refer to Judge Story as his authority), that in *the interpretation* of wills of real estate, the law of the domicile governs "where the object is merely to ascertain the meaning and intent of the testator," while Judge Story refers the *construction* of such a will to the law of the domicile.

There is a vital difference between *interpretation* and *construction* in such a connection, and the power of even interpretation is itself limited by Greenleaf.

These expressions still leave it uncertain as to what Messrs. Greenleaf and Story really meant by *interpreting* or *construing* a will by the law of the domicile; whether it is a limited or a general power of interpretation and construction—whether it is limited to ascertaining the meaning of the testator from certain words used by him which have a peculiar local color, or includes a construction of the legal effect of ordinary language, (as to the character and extent of the estates created by it) which will have universal application.

The deficiencies of the English language are well illustrated in this case. The words might mean much; they probably mean very little.

The other more specific quotations from and references to Judge Story's views concerning foreign control of local lands, given on p. 23-24 of this brief, show that he at least did not intend by his above expression to approve the comprehensive power of construction claimed by the plaintiff in error.

2. **Ford vs. Ford,** 70 Wis, 19; **Ford vs. Ford,** 80 Mich. 42. Two cases concerning the same will and estate, construing the effect upon lands in Wisconsin (the domicile) and Michigan of the following provision: "I direct that all properties in Schedule A attached to this instrument and bearing my signature, (which described the lands in question), shall be converted as soon as practicable after my decease, into good, rentable, inside property in Kansas City, Mo., at schedule prices, or as much better as may be."

The Wisconsin Court, as the Court of the domicile, interpreted the above provision as intending an equitable conversion, but added, (p. 51).

> "What has been thus said is not by way of determining the validity of the title to any lands outside of Wisconsin, nor the validity of any investment or trust in or tenure of such lands, but merely to ascertain the meaning and intent of the testator from the language employed in the will, which, as we have seen, is a duty devolving upon this jurisdiction."

The Wisconsin Court further explained its meaning at a *second* hearing of the same case (Ford vs. Ford, 72 Wis., 621), saying then in part, (p. 624) in explaining its former opinion above:

> " '*That the language so used works an equitable conversion of the lands in said States of Kansas and Michigan into lands in Kansas City, Missouri.*' * * * * * * * * The words in italics (those quoted) standing alone would be an attempt to adjudicate upon matters which this Court

repeatedly disclaimed any purpose of determining, and hence remitted the same to other rightful jurisdictions. 70 Wis., 44, 50-1, 62-69. By a careful reading of the passage quoted it will be observed that the words in italics are inserted as a mere paraphrase of the words which precede them which merely declare what the 'testator *intended* from the language used.' The words in italics, therefore, must be regarded merely as another way of stating what the 'testator *intended*' by the use of the language employed. Besides they are immediately followed by other words which expressly declared that no attempt is thereby 'made to determine the validity of the title to any lands outside of Wisconsin, nor the validity of any investment or trust in or tenure of such lands, but merely to ascertain the *meaning* and *intent* of the testator from the language employed in the will.' * * * * * (p. 627). On the other hand should the Courts of Michigan or Kansas hold the will or the proposed conversion of the lands therein situated, to be invalid then they would pass out from under the operation of the will and never become subject to the trust."

The Court goes on to say, (p. 628) that its judgment must be regarded as "leaving open for further action the questions as to the validity of such conversions, suspensions and accumulations, until authoratively determined by the rightful jurisdiction, as required by the mandate of this Court on the former appeal. In order to pass intelligently upon the questions presented relative to the personal property and lands in this State, it became necessary upon the former appeal to construe the will as a whole in order to discover the nature, extent and duration of the trust imposed. This was done, 70 Wis., 46-48, 49-50, 51-53, 53-62. Such construction is followed in the opinion by a disclaimer of authority to determine the legality of such trust—except as to the lands in Wisconsin,—and the other matters left open in the opinion as above indicated. 70 Wis., 62-69. What is said in the judgment here appealed from in respect to the nature, extent and duration of such trust, and the respective rights of the several beneficiaries thereunder, must be regarded as held open and subject to determination by the rightful jurisdictions, as indicated in that opinion.

In fact the judgment is mostly provisional, and does leave open the validity of such trusts, conversions, suspensions and accumulations until authoratively determined by the rightful jurisdictions. This appears from what has already been quoted therefrom and other passages which might be quoted."

The Michigan Court subsequently considered the same provisions of the will and in the course of its opinion says: (p. 50.)

"In our view of the case, the question does not become one of much importance, but we think the law well settled that the meaning and intent of the testator having been settled by the domiciliary Court, the Courts in foreign States and Countries will be *guided* by such construction, unless it can be clarly gathered from the terms used in the will that the testator had in mind the law of the place of the situs or used language necessarily referring to the usages and appropriate only to the situs.'

* * * * *

(p. 51.) "Aside from these considerations, however, we are satisfied that it was the intention of the testator, as indicated by the terms of the will, to give to his executors the absolute power to sell and convey the Michigan lands, and this without condition or limitations."

* * * * *

(p. 52) "The true intent and meaning of the testator having thus been ascertained as far as relates to his Michigan lands, it is now important to ascertain *what effect* the will has upon these lands, and how far the executor may proceed in their disposition. The direction that the exchange should be made is imperative and, as we have seen, without condition. Equity must therefore consider that done which the testator lawfully directed, unless such disposition is unlawful, or as counsel contend affected by our statutes against perpetuites which we shall consider further on. *We have no doubt that this equitable conversion was effected by the terms of the will.*"

It will thus be seen that while the Michigan Court expressed a willingness to be "guided" (not controlled) by the Wisconsin Court in ascertaining the *meaning* and *intent* of the

testator, it nevertheless took it for granted that it was its own right and duty "*to ascertain what effect the will* (so interpreted) *has upon these lands, and how far the executor may proceed in their disposition*"; and then apparently to assure itself that it might safely yield to a Wisconsin interpretation even of the meaning, it also proceeded to construe the will for itself and determined after an independent examination, that the Wisconsin interpretation was right, and "*We* (Michigan) *have no doubt that this equitable conversion was effected by the terms of the will.*"

And the very recent Wisconsin case of Frame vs. Thormann, 102 Wis., 653, (1899) likewise shows that in neither of those two states was there any intention of yielding to the other, the power to construe the *effect* of a testamentary disposition of local lands, or rather, as it is termed, to determine the "*validity*" of the disposition, to accomplish the imputed intent. Quoting from that case, p. 669:

> "The Courts of Wisconsin are, of course, bound to give full faith and credit to the public acts, records, and judicial proceedings in Louisiana, as well as every other State in the Union. Const. of U. S. art. IV, Sec. 1. * * * * So it (Wis. Court), has gone so far as to hold that where a resident of Wisconsin, owning lands in other states, makes a will disposing of all his property, the validity of the will, so far as such lands were concerned, must be left to the courts of the states respectively, where such lands were situated. Ford vs. Ford, 70 Wis., 19; S. C. 72 Wis., 621. In that case it was held, as the settled doctrine, supported by numerous adjudications, that the validity of every disposition of real estate by will must be governed by the law of the place where the land is situated, and that the validity of every disposition of personal property by will must be governed by the law of the testator's domicile at the time of his death. 70 Wis., 44, 45. It was also held in that case that where such will directed the personal assets to be invested in lands in another State, the validity of such investments must be left to the courts of such other state. Such rules were followed in such other states. Ford vs. Ford, 80 Mich., 42; Robertson vs. Pickrell,

109 U. S., 608. These cases are cited to show that it has been and is the settled purpose of this Court to give full faith and credit to the public acts, records and judicial proceedings of other states. But to entitle a judgment in a court of another state to such full faith and credit in an action or proceeding *in rem*, like the case at bar, it must appear from the record thereof that the court rendering the same had jurisdiction of the subject matter of the action or proceeding."

The cases refered to in the Michigan opinion above (80 Mich., 47) have been cited by the Plaintiff in error and are referred to hereafter. The case of Ford vs. Ford itself together with Gueard vs. Gueard are cited in a paragraph in Dicey on Conflict of Laws American Notes (1896) in a connection which throws light upon the situation. The author of the notes having stated (p. 528) that:

"Generally speaking, all questions touching the validity, construction and effect of wills relating to immovables are determined by the lex situs."

He goes on to say:

"But the Court of the situs, may, in determining the *meaning* intended to be conveyed by certain words, infer such a meaning from the sense attached to them by the law of the State in which the will was made." (citing those two cases).

Even here, moreover, the local meaning to be sought after is described as that of the place where the will was drawn, (in this case, Connecticut), and not the place of the domicil.

3. Trotter vs. Trotter, 4 Bligh, N. S. 502, (1818) concerned an English will of personalty and Scotch heritable bonds (realty). The will was conceded to be invalid under the laws of Scotland, because defectively executed, and the heritable bonds there went to the heir. The will was valid as an English will of personalty, and the question was whether the scheme or intent of the will was such that the heir, in claiming the personalty under the will, ought in equity to be compelled

to elect between the will and his rights as heir, so far as he would obtain an unfair advantage by taking both.

The Court was concerned solely as to the disposition of the personalty, and, as affecting that, had to determine the intent of the will as to the Scotch realty; not in the least to affect the title or rights to that realty, but only to decide what proportion of personalty in England the heir might equitably take under the will. All rights in the Scotch realty had already been determined or conceded, and were in no way affected by the English interpretation, which concerned the personalty alone.

The Court said in part, p. 509:

> "If I am asked to conjecture what his intention was I have no hesitation in saying that I should conjecture that it was his intention to give the real property, but, there is not such expression of intention on the face of the will as, I think, can justify your lordships in giving it that effect. It is nothing more than conjecture; the intention is not expressed as it ought to be for the purpose of raising an election."

The above is doubtless an authority for us as to what is a *sufficient expression* of intention, whoever interprets it, but it does not support the appellant's claim that the South Carolina Court may construe the will so as to directly affect the Connecticut lands.

4. **Maxwell vs. Maxwell,** 2 De. G. M. & G. 705, (1852), and **Orrell vs. Orrell,** L. R. 6 Ch. 302, add nothing to the force of Trotter vs. Trotter (above).

The later case of Lloyd vs. Guibert, 1 Q. B. 115, (1865), says in part, (p. 122):

> "In the diversity or conflict of laws, which ought to prevail, is a question that has called forth an amazing amount of ingenuity and many differences of opinion. It is, however, generally agreed that the law of the place where the contract is made, is prima facie, that which the parties intended, or ought to be presumed to

> have adopted as the footing upon which they dealt, and that such law ought therefore to prevail *in the absence* of circumstances indicating a different intention, *as for instance:* That the contract is to be entirely performed elsewhere, *or that the subject matter is immovable property situate in another country* and so forth."

And the Scotch case of Fenton vs. Livingston, 3 Marcq. App. Cas. 497, (1859), speaks in no uncertain way of the prerogatives of the Court of the Situs: Per Lord Wensleydale, p. 548.

> "Though there have been questions perhaps not difficult to decide as to the capacity to convey and the form of conveyance where the country of the domicile and that of the estate differ, it is fully established that the law of the country in which the property is situate governs exclusively as to the tenure, the title and the descent of such property."

Our view of the actual application of the principal case above, (Trotter vs. Trotter) is supported in the case of Van Dyke's Appeal, 60 Pa. St., 481, concerning a Pennsylvania will where the court says in part, p. 490:

> "The case before us is of a will duly executed according to the laws of Pennsylvania, devising lands in New Jersey, where however, it is invalid as to the reality by not having two subscribing witnesses. A court of New Jereys might hold themselves on these authorities bound to shut their eyes on the devise of the reality, and consider it as though it were not written, and so they have held. (Kearney vs. Macomb, 1 C. E. Green, 189.") * *
>
> "But a statute of New Jersey has no such moral power over the conscience of a court of Pennsylvania to prevent it from reading the whole will upon the construction of a bequest of personalty within its rightful jurisdiction. If a question could arise directly upon the title of the heirs at law to the New Jersey land, doubtless the court of any other State, upon the well settled principles of the comity of nations, must decide it according to the lex rei sitae. We are dealing only with the bequests

of personalty, and the simple question is whether the testator intended to annex to them a condition."

And the true application of the principal case from the other side (the side of the situs) is also shown in the case of Jones vs. Jones, 8 Gill, (Md.,) 197, concerning the effect, (as to the same doctrine of election) of a Pennsylvania will of Maryland real estate, invalid as to the real estate through defective execution. The court says in part, p. 207:

> "Whatever may be its construction and effect in Pennsylvania, it cannot operate to divest either party of his inheritance here, or put him to his election. There is no such expressed condition in this will, and we cannot as before said, imply it."

5. **Enolim vs. Wylie,** 10 H. L., Cases 1, (1862), was simply a question whether a Russian will was intended to include English personalty. We do not understand that the case attempts to decide any rule of interpretation except concerning the disposition of personal property.

6. **Chamberlin vs. Napier,** L. R., 15 Ch. Div., 614, (1880) seems to support the general rule, and in no way the appellant's claim. It was a question of marriage settlement, the realty being in England and the rest of the property in Scotland, and the marriage domicile there also. The Court interpreted the settlement as to the land by the English law, and otherwise by the Scottish law, and said in part, (p. 630) approving the rule adopted in Lloyd vs. Guibert above):

> "Mr. Justice Willes in the judgment delivered by him in Lloyd vs. Guibert, after referring to the general rule that the law of the place where the parties contracted was prima facie that which they intended to adopt, says, 'that such law ought, therefore, to prevail in the absence of circumstances indicating a different intention, as for instance, that the contract is to be entirely performed elsewhere, or that the subject matter is immovable property situated in another country, and so forth.'" * *

And the Court concluded, p. 633.

> "It is in my opinion, as plain as possible that the contracting parties did in substance, though not in direct terms, say that the trusts, so far as the husband's property is concerned, should be considered as being in a settlement to be construed by the law of England. That is quite consistent with the general rule laid down in the judgment delivered by Mr. Justice Willes in Lloyd vs. Guibert, and no authority has been referred to which is contrary to that rule."

7. **Boyes vs. Bedale,** 1 Hem. & M. 798 was over-ruled in the subsequent case of ReGoodman's Trusts, L. R. 17 Ch. Div. 266, 299.

8. **Danelli vs. Danelli,** 4 Bush., 51. The testator was domiciled in Kentucky and the land was in the same State. The question was raised as to whom the testator meant by "children or heirs" and whether a claimant was the legitimate "child" of a brother. The court concluded that the validity of the marriage depended on the law of the place of marriage but the intent of the words "children or heirs" on the law of the place where the will was made and the testator domiciled. The domicile and the real estate and the forum were all in Kentucky, and we do not see how the decision or any dicta in it can illuminate the path to a decision here. We do not believe the case was intended to modify the earlier Kentucky decision that:

> "It is an acknowledged principle of law that the title and disposition of real property is exclusively subject to the laws of the country where it is situated."
>
> Cornelison vs. Browning, 10 B. Mon., 425,

9. **Bible Society vs. Pendleton,** 7 W. Vir., 79, the testatrix had previously conveyed all of her real estate in Pennsylvania by deed, *inter vivos*, to a party in trust, to sue for and recover the same and sell it and then to hold the net proceeds "subject to such dispositions as the said Maria Cooper, by deed or other instrument of writing may hereafter direct." The will

was therefore a disposition of those proceeds after conversion accomplished by the prior deed, and as a will of personalty alone was properly governed by the laws of the domicile. (W. Virginia).

The Pennsylvania real estate was not concerned, as the prior deed was apparently accepted as valid in Pennsylvania as well as in West Virginia.

10. **Harrison vs. Nixon,** 9 Peters, 483, was similarly a question of personal property alone and its dicta were not intended to affect realty.

From before the early leading case of McCormick vs. Sullivant, 10 Wheaton, 192 (1825), so generally cited, to the latest case of DeVaughn vs. Hutchinson, 165 U. S. 566, 570, (1896) this Court has, as already stated, always consistently held as to real estate: (quoting from last case).

> "It is a principle firmly established, that to the law of the state in which the land is situated, we must look for the rules which govern its descent alienation and transfer, and for the *effect* and *construction* of wills and other conveyances."

11. **Crusoe vs. Butler,** 36 Miss., 150, (1858), was a question as to whether the one executor of an Alabama will, who alone qualified, had power to sell Mississippi land under the following power of sale in the will: "I do hereby declare and direct and give full power and authority to my said executors (two previously named) or the survivor of them" to sell, etc.

The Alabama Court had previously decided (Leavens vs. Butler, 8 Porter, 380), with reference to this same power and will, some twenty years before: p. 390.

> "The testator has not made the plaintiff in error, who seems to be the only acting executor, a mere naked trustee, but he has made him a beneficiary of his bounty to the extent of one-fourth of his estate, and has thus coupled his trust with an interest."

The Mississippi Court followed this Alabama decision, by way of comity, and held that the one executor could therefore act alone in conveying the Mississippi land.

12. **Wilson vs. Cox,** 49 Miss., 538, adds nothing to the force of the earlier case. The case was a question of election by the widow of a Louisiana testator as to the Mississippi lands, and the Court held that the widow must make her election at the domicile for the whole estate.

The Court said in part: p. 545.

> "Her election, if made at all, must be in the forum of the original probate, whose law fixes her rights as distributee in all the jurisdictions where property may be situated. The 110th article of the code, p. 452, reverses the common law rule of distribution in cases of intestacy, substituting the law of the rei situs for that of the domicile."

But the above could not have been intended to mean all that it expressed. No Court could literally fix "her right as distributee" in foreign lands where the "law of the rei situs" governed the distribution. The case may go far enough to give the Court of the domicile the right to determine as to the widow's election—as a question in personam rather than the determination of a right in rem—but the carelessness of its expression, as above illustrated, cannot give force to all the possible meanings of its language beyond its application to the facts concerned.

Whatever the dicta of the two cases above cited may be supposed to mean, the fact is that no State goes to greater lengths than Mississppi in controlling the transfer of property, both real and personal, within its limits. Under section 1950, code 1871, even personal property has been distributed under its laws, without regard to the law of the domicile of its owner.

> "The necessary effect of the statute is to abolish ancilliary administration here altogether. * * * Whatever surplus remains after creditors have been satisfied must be distributed to the next of kin, as prescribed by

our laws, although different persons from those who take in the jurisdiction of the domicile."

Partee vs. Kortrecht, 54 Miss. 67, 70, (1876).

"Her power of disposition and dealing with it (Mississippi land) are by our laws impressed upon the property itself. As to none of these things has the law of Louisiana (the domicile) the slightest influence." * * * "The principle of comity does not require a State to regard the laws of any other State so far as they may affect contracts in relation to real estate situated in the former State."

Frierson vs. Williams, 57 Miss. 451, 463, 464, (1879).

Would Mississippi under these decisions give effect to an intention solely *imputed* by South Carolina law?

13. **Wilkins vs. Allen,** 18 How., 385. A case where the testator was domiciled in Pennsylvania, and the land concerned was situated in the same State. That case cannot help the appellant here, and the law of Pennsylvania would deny his claim; see Page's estate, 75 Pa. St., 87, on page 29 of this brief.

14. **Wood vs. Wood** 5 Paige ch. 596 was practically overruled in the subsequent case of Chamberlain vs. Chamberlain 43 N. Y. 424, 431, also cited by the appellant, and the dicta of the latter case were evidently intended concerning the disposition of personalty.

P. 435. "The case of Wood vs. Wood (5 Paige 596) was peculiar in its circumstances, and can, in view of the final disposition of it by the chancellor scarcely be regarded as a precedent."

P. 433. "*Personal* property has no locality, and therefore the law of the domicile of the owner governs its transmission, either by last will and testament or by succession in case of intestacy."

15. **Cross vs. U. S. Trust Co.,** 131 N. Y., 330.
Dammert vs. Osborn, 140 N. Y., 30.

Were both cases concerning personalty alone, and raised questions as to whether the New York statute against perpetuities would prevent the operation of the general rule, that the law of the domicile governs as to personalty. The statute was held to be restricted by its terms "to domestic wills that by their terms are to be executed here."

16. **Caulfield vs. Sullivan,** 85 N. Y., 153, was a case where a New York testator living temporarily in France gave all his property to A, on condition that she would give so much of it as was in America to B. A took all the property in France under the will, and then tried to collect a large claim against the testator from the New York estate. The New York Court compelled A. to elect whether she would abide by the will or prosecute her claim.

The question in the case at bar is not as to an election by a beneficiary, but as to a conversion of land under the will.

17. **Parsons vs. Lyman,** 20 N. Y., 103, involved a question of the administration of the proceeds of two houses held by leasehold (which were treated as personalty). There was a disagreement as to the construction of the will between the Surrogate of New York, (the locus), and the Supreme Court of Connecticut, (the domicile). The Court of Errors of New York held that it was a matter not of jurisdiction, but of judicial discretion depending on the particular circumstances of the case; and that here the Surrogate should permit the executor to transfer the net assets to the Connecticut jurisdiction, "whose duty it thus becomes to decide all questions regarding the distribution of the moneys of the estate."

The plaintiff in error gains no support from the above case; especially not when explained by the later case of Despard vs. Churchill 53 N. Y. 192. *Syllabus:* "A leasehold estate for years, of lands situate in this state owned by a resident of another state, will be considered as personal property, and as such, as to its transmission by last will and testament, controlled by the law which governs the person of its owner."

And the Court on page 199 practically cites the above case of Parsons vs. Lyman as its authority for that conclusion.

The New York cases cited heretofore on page 29 are more nearly in point concerning the New York rules as to the local control of New York lands, than either of the Appellant's New York cases above.

18. **Guerard vs. Guerard,** 73 Ga., 506, held that the words "own right heirs" were to have the meaning given them at the domicile. They were treated as a *descriptio personarum.*

As to "construing" the will, however, the Court said (p. 510):

> "Wills devising real estate situated in this State will be construed according to the rules of construction adopted by the laws of this State.

We add a reference to another Georgia case which is more in point as to the effect of foreign decisions upon Georgia lands.

Kerr vs. White, 52 Ga., 362, concerning a Tennessee will leaving Georgia lands to Mr. White, also of Tennessee, in trust. The Court said in part: p. 270.

> "If Mr. Kerr might own real estate here he might convey or devise it to Mr. White in fee or in trust, provided he did it according to the laws of this State. That the deed or will has a trust attached does not alter the matter?
>
> "We do not think it necessary to go into the meaning of the law of Tennessee. That, in our judgment, has nothing to do with it. This is Georgia land, and the title to it is to be regulated by our law, and not the law of Tennessee. Mr. White has the title under our law, and any conditions imposed by the Courts of Tennessee cannot affect it."

We cannot believe that the appellant's claim would prevail in Georgia.

19. **Van Steenwyck vs. Washburn,** 59 Wis., 483.
Washburn vs. Van Steenwyck, 32 Minn., 336.

Two cases concerning the same estate. The testator was domiciled in Wisconsin and owned real estate in both states. The question was whether the widow, then incurably insane, must elect whether she would take under the will or would take her statutory rights; and how such an election could be made in her case.

The Wisconsin court held that the widow must elect; that it could elect for her, and that she thus elected to take under the will. And that Court said in part, p. 510:

> "How this election may or should affect the rights of the widow in real property in other States is a point upon which we decline to express an opinion, although the executors ask us to decide the question here. But it seems to us the decision of that question may properly be left to the tribunals of the State where such real estate is situated." * * * *
>
> "This observation however may be made; it is generally agreed by writers on the subject, and the rule has frequently been acted on by the Courts, that the interpretation and construction of the will belongs to the tribunal of the domicile of the testator." * * * *
>
> "But real estate is governed by the lex loci and questions in respect to it properly belong to the jurisdiction where it is situated. There may be exceptions to this rule, as the Counsel for the executors claim. But suffice it to say, we shall not attempt to define the rights of Mrs. Washburn in real estate in other states. * * *
>
> "But the construction of this statute (Minnesota), as well as the question as to what effect must be given the election for the widow made by the Probate Court (Minnesota) we shall leave for the decision of the Supreme Court of Minnesota."

The position of the Wisconsin Court as to its power of interpretation and construction is still further explained in the later cases of Ford vs. Ford, 70 Wis., 19; 72 Wis., 621, and Frame vs. Thormann 102 Wis., 653, hereinbefore referred to

The Minnesota Court said in part, p. 347:

> "Although the testator at the time of his death had his domicile in the State of Wisconsin where the will

> is executed and where the widow still is domiciled, we refer to the law of our own State for the descent of lands situated here. It is an established principle of the law, that real estate is exclusively subject to the laws of the government within whose territory it is situated. This governmental power of the State is a necessary incident of the sovereignty which every nation exercises within its own borders." * * * *
>
> "P. 357: Of course the principle of the State sovereignty, to which we have already referred, forbids that the tribunals of one State should assume to affect directly by their judgments the title to lands within another State." * * * * *

The Minnesota Court held that as the decree of the Probate Court had been appealed from, the probate proceedings in Minnesota were still in abeyance when the Wisconsin decision was made; that the Wisconsin Court had jurisdiction to determine whether the widow should *elect*, and that the election having been thus first made there for *a part*, it would be held to have been made for the *whole estate*. That the parties and the matter being the same, and within the jurisdiction of the Court, it was res judicata. The question was treated in both Courts as one *in personam* as to the widow's status under the will, and not as one *in rem* concerning the disposition of Minnesota lands.

In the earlier case of State vs. Ueland, (Judge of Probate) 30 Minne., 277, (1883), concerning the same will and estate, the executors endeavored to restrain the Minnesota Probate Court from construing the will and determining an election for the widow. One of the facts involved as stated in the record, being the pendency of a case in the Wisconsin Circuit Court brought by the executors to determine the same matter. The Minnesota court did not directly discuss the conflict of laws, but held generally that the Minnesota Probate Court had jurisdiction; and said in part: p. 282

> "Hence in the proceedings now pending in the Probate Court, that Court has the power to construe the will of the decedent, in order to determine whether, under

its provisions, it is a case for an election on the part of the widow."

The scope and reason of the Minnesota decision above, appears more clearly in the similar later case of Lee vs. Tower, 124 N. Y., 370, (1891), where the question was whether a Pennsylvania widow was bound, as to New York real estate, by her election in Pennsylvania. The New York Court said in part: p. 374.

> "When the widow accepted the provision made for her, she in legal effect consented to all the terms and conditions annexed to it, and yielded every right inconsistent therewith.
>
> "No one can be allowed to disappoint a will under which a benefit is accepted, but on the contrary must concede full effect to the dispositions thereof."

But that very case treats of *conversion* as a very different kind of question, and claims the unrestricted right to determine it for land situated in New York; and so does the Minnesota Court also concerning that same will and estate In Re Towers estate, 49 Minne., 371, (1892). There is a marked difference between a question of election, and the question as to whether or not certain lands have been converted into money under a will.

The Ohio Court in the case of Jennings vs. Jennings, 21 Ohio, St., 56, already cited, compelled a widow to elect as to the Ohio land, holding that it was the intention of the testator, as interpreted by the Ohio law, that her legacy should be in lieu of dower, and not in addition to dower, as it was conceded was the intention as interpreted by the laws of West Virginia, the domicile.

In the case of Appperson vs. Bolton, 29 Ark. 418, (1874), a Tennessee widow had renounced her provision in the will in a Tennessee Court and the Court had apparently said that that action under the laws of Tennessee must govern also as to her interests in the Arkansas lands.

The Arkansas Court said in part: p. 426.

> "The alienation, transmission and descent of real estate is governed by the laws of the country or State in which it is situated.
>
> "This rule is general, and there is no diversity of opinion about it. So the general rule is that the right of dower in real estate is governed by the locus rei sitae." * * *
>
> (p. 429). "But it has been suggested that if a dissent in Tennessee is not a valid dissent in Arkansas, an acceptance of the provisions of a will in Tennessee would not be binding here; and that if Bolton had devised to his wife his whole estate in Tennessee, no matter how large, she might have accepted it, and then dissented in Arkansas and claimed dower in the estate here. But we think, though the point is not before us, that she would not be permitted to do that, for it is a general principle of law that one cannot claim under a will and against it too, and an acceptance of the provisions of the will in Tennessee would bind her everywhere."

The court held that the provision of the will was intended in lieu of dower and that the widow was barred of her dower in the Arkansas lands because she had not dissented as required by Arkansas laws.

The rule concerning the doctrine of election, as applied in the English case of Trotter vs. Trotter, (from the dicta in which the claim made by the Appellant seems to have started) and in the later Wisconsin case of Van Steenwyck vs. Washburn, although regarded differently by other Courts, does not apply to the doctrine of equitable conversion. There is not the same reason for it. Election is a question of requiring equitable action by a person claiming under the will in one place and against it in another. It is a question *in personam;* of personal honesty and right action. Conversion is a question of how the will disposes of the lands; a question *in rem.* Not, *who* is to take? Or, *how much he ought to take.* But, how the will affects *the land* in question.

And there is a similar difference in the application of the rule of *res judicata* to questions *in personam* and to those *in rem*.

Watkins vs. Holman, 16 Peters, 25, 57.
Burnley vs. Stevenson, 24 Ohio. St. 474.

All of which is respectfully submitted.

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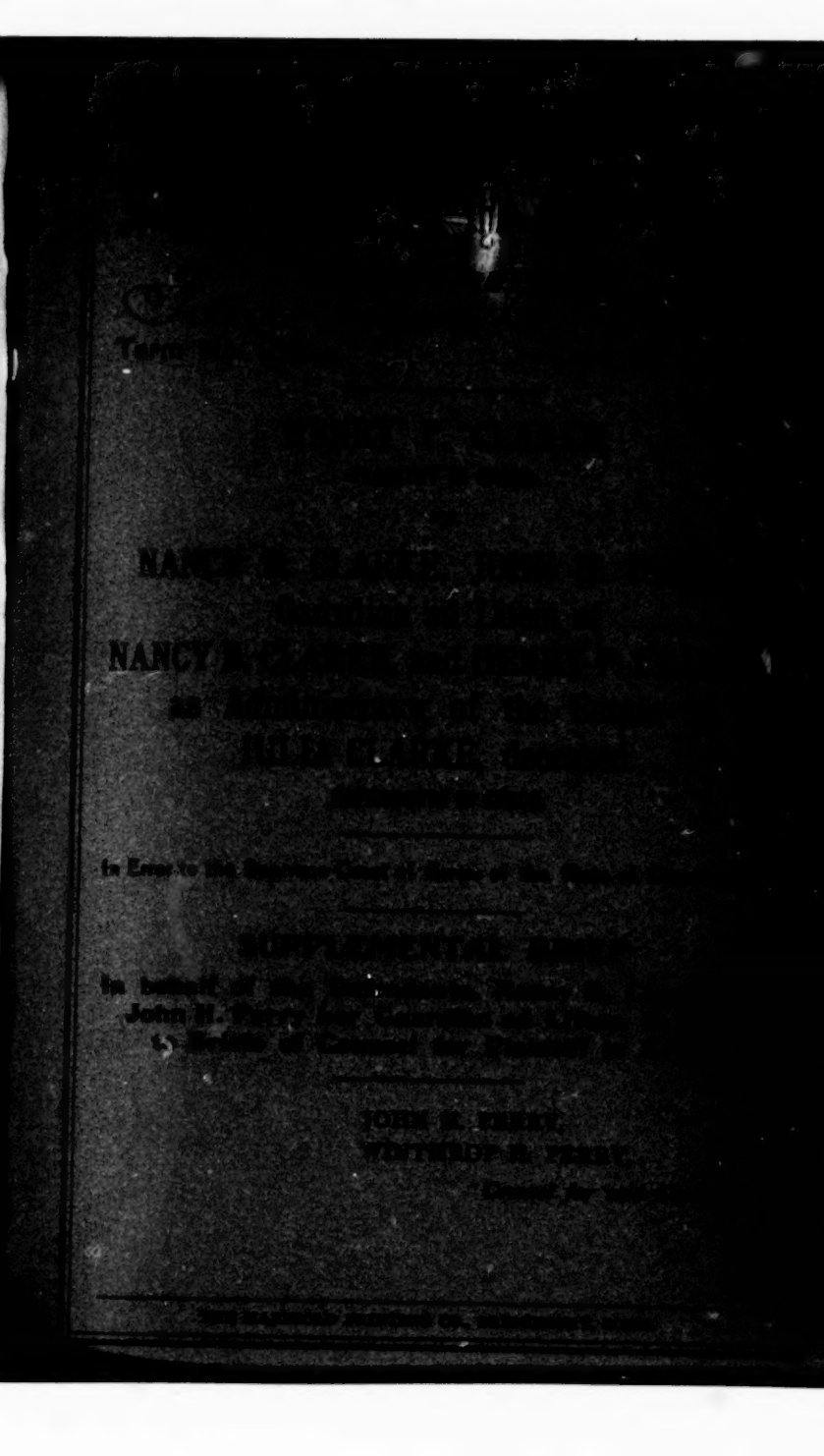

Supreme Court of the United States.

October Term, 1898.

HENRY P. CLARKE,
Plaintiff in Error,

vs.

NANCY B. CLARKE ET AL.
Defendants in Error.

No. 216.

SUPPLEMENTAL BRIEF FOR NANCY B. CLARKE AND JOHN H. PERRY, HER GUARDIAN AD LITEM, IN REPLY TO BRIEFS FOR PLAINTIFF IN ERROR.

PART I.

BY WAY OF CRITICISM.

A.

At the end of the first brief filed by counsel for plaintiff in error on March 14th, beginning with page 27, what is described as "the full record of the South Carolina Case" is printed. We do not know what use Counsel may expect to make of this, or what bearing it may be supposed to have upon the pending question.

We claim, however, that it should not be read, or referred to for any purpose, and ought not to be in the brief. It con-

stituted no part of the Connecticut case, and now appears for the first time since we became connected with the litigation.

In the Connecticut Court of Probate, merely "the *decision* of the *Supreme Court* of South Carolina," (record p. 8, folio 20) was filed, and in the finding of the Superior Court only "the report of the case in 46 So. Car. 230" was referred to.

This excludes all of the record printed in their brief before the word DECREE on p. 34, as well as the last two clauses on p. 38, and the clause at top of p. 39.

B.

The same brief in the third paragraph on page 2, states that the father in his individual capacity was "duly represented" in the probate court. The probate record (last two lines p. 7, and first two lines p. 8 of transcript) shows that he did not appear there as an individual although he undoubtedly might have done so.

C.

Of their assignment of errors, wherever it appears in the case, (as for instance at top p. 4. of the brief in question), it should be said that the only claim made in the Court below is found in folio 74, p. 43 of transcript, and, as made, it counts upon no part of the South Carolina judgment except the single clause that "the will worked an equitable conversion into personalty at the time of her death of all the real estate of the testatrix wherever situated." Their assignment of errors accordingly covers materially more ground than the claim by which it should be limited.

D.

Counsel for plaintiff in error are apparently permeated with the belief that Mr. Clarke was really a party to the South Carolina suit as an individual, and really appeared therein in that capacity, (see p. 7, of their first brief). The report of the case utterly fails to bear out this theory, and certainly shows that Julia's estate was entirely unrepresented either by trustee or administrator therein.

E.

In the last paragraph on p. 10 of the above brief, it is claimed that Mr. Clarke "as an individual" "set up the judgment and proceedings in the South Carolina Courts * * * as record evidence and conclusive of his own rights as an individual and those of his daughter." We earnestly protest against this statement.

A reference to the record, (p. 8, folio 20) already several times referred to, will show that he did not appear as an individual at all, and that he did not set up the judgment here relied on.

As administrator of Julia's estate, he caused to be filed in Court *merely* "the decision of the Supreme Court" affirming the judgment here relied on.

That decision could not become a bar or work an estoppel.

If anything in any event could avail the plaintiff in error, it surely would be the judgment of the Circuit Court, (never introduced in the Probate Court), and not the decision of the Supreme Court affirming it. The decision filed was evidently intended to be only a reason for a similar decision by the Probate Court.

F.

In the second brief filed by the plaintiff's counsel on Mar. 22d, a statement in the last paragraph on p. 2, (somewhat obscured by an evident misprint), if important, needs correction. The personal and real estate of the testatrix already severed from all connection with that of others, amounted at her death to $158,825, (record, p. 14, par. 10,) while her debts and legacies amounted to not more than $65,000.

The situation was of course very different when the will was made two years and a half before. At that time her grandfather, from whom her property was derived, had but just died, (p. 14, par. 10) and, coming to the place of his late residence and the city where the great bulk of his property, and her inheritance, was situated, she made her own will under the guidance of local counsel. She evidently made it on

account of the sudden and vast change in her financial condition, for there is nothing to show that she owned any property before. Is it probable that a person who came to Connecticut to dispose of a Connecticut fortune by the help of Connecticut Counsel, desired to have the expressions which she used in so doing bear a sui generis South Carolina construction which she could not possibly have foreseen?

PART II.

THE SITUATION AS WE VIEW IT.

The real situation does not seem to us to be as portrayed by the plaintiff, but to be as follows:

Mr. Clark, as executor of his wife's will and trustee for Nancy (but not for Julia), had obtained the South Carolina decision.

Under that he attempts no action of any kind in Connecticut. A year afterwards he takes out administration there upon Julia's estate.

In that capacity the South Carolina decision had no binding force upon him whatever. He subsequently inventoried her assets as consisting of an undivided interest in "real estate." He manifestly believed that the South Carolina decision, proprio vigore, accomplished nothing, and that the Connecticut Courts were now in control. He was quite correct in this belief, for otherwise, all he had to do was to sell his wife's property as executor under that decision, and transmit the proceeds to his home for distribution there. Accordingly he does not ask to have the South Carolina judgment enforced; he does not pretend that he can carry it out; he does not ask for authority to convert his wife's real estate and pay over the proceeds as money to Julia's estate; but having passed the property along as "real estate," he in his capacity as administrator represents that Julia "died intestate and *possessed of real estate* in this District," and asks the Court of Probate to ascertain to whom "this estate shall be *set out and distributed.*" (p. 6, folio 9). The Court of Probate, at the request of this official

not connected with the South Carolina decision, settling an estate not affected by it, awards the "real estate" upon which he requested it to act to the only person who could possibly inherit under the law alone administered in that tribunal.

If the administrator should tender money to Nancy as her inheritance from Julia's estate, Nancy might well reply, my mother owned land at her death, one-third of which she gave to my sister, which third it was your duty to secure and administer and afterwards pass on to me.

As between you, Mr. Administrator, and my sister's estate and me, the South Carolina Courts have not worked any miracles which make my land money and then diminish it one half.

If the plaintiff's contention be sound, Connecticut residents will often be compelled to ask the Courts of other states to determine their title to Connecticut lands, because derived from the deeds or wills of non-residents which cannot be authoritative construed except by the Courts of the domicile, and several consecutive wills disposing of the same piece of land in ipsissimis verbis, might convey as many different titles as the testators had domiciles.

PART III.

CONCERNING THE CLAIMS MADE AND THE AUTHORITIES CITED FOR THE PLAINTIFF IN ERROR IN THEIR TWO BRIEFS.

The Counsel for Plaintiff in error seem to make and rely upon five principal claims: three shown in their brief filed March 14th, and two in their brief filed March 22nd, all of which their course of reasoning tacitly admits must be sustained to make good their contention. These are in their order:—

I. That the parties, though not nominally the same, were "really and subitantially the same" in the pro-

ceedings in both states; that "In the South Carolina case, every possible interest was represented."

(See pages 5 and 7 of their first brief).

II. That "the subject matter"—"the sole question considered," in both of the proceedings, was, "whether or not there was an equitable conversion of Mrs. Clarke's real estate by her will at the time of her death into personalty." That is, a question of the construction of the will, as to whether or not there was an equitable conversion, irrespective of the lands affected thereby.

(See pages 11–13 of their first brief).

III. That this question, whether or not there was an equitable conversion, was a question *in personam* and not a question *in rem*.

(See pages 16–17 of their first brief).

IV. That the South Carolina Court had such jurisdiction of the parties in this case, that it was immaterial whether or not the real estate concerned was within its jurisdiction; and besides, that the power of the South Carolina Court to enforce its judgment in Connecticut was not a test of the validity of that judgment there.

(See pages 14–15 of their first brief and first eleven pages of their second brief).

V. That it is for the Court of the domicile to determine the interpretation, construction and effect of a will of foreign real estate.

(See last twelve pages of their second brief).

We have already considered the above claims in our principal brief, but would add a few words, especially in reference to the cases not hitherto referred to, which are now cited for the plaintiff in error in their support.

I.

It is virtually conceded that the parties were not nominally the same in the two proceedings, but the plaintiff in error claims that they were "really and substantially the same." Not that they were the same in identity and legal character, but the same in the interests they actually appeared for, and that all the interests concerned were in Court in both cases. That, as a conclusion of equity rather than of law, the parties should be held to be the same. In addition to the claims of our principal brief, we add in direct answer; that while Nancy was a party defendant in South Carolina, she was but seven years old and could not in law or in fact submit or represent her Connecticut interests there; nor could her guardian ad litem appointed by the South Carolina Court submit her Connecticut interests to the jurisdiction of that Court, or properly represent those interests there by virtue of his South Carolina appointment.

However good the reason may be for interpreting a will by the law of the domicile, or of the last domicile, whether because the testator has used a phraseology peculiar to that locality, or because, in the case of a will of personalty, the law of the last domicile governs the succession, cannot apply in this case.

The South Carolina Court has no power to act for, or control, any Connecticut land, unless by personal coercion of an owner having full power and capacity to act. Surely the South Carolina Court could not give a guardian ad litem the power to represent an infant it could not coerce and an interest it could not control, and *thus* obtain for itself a jurisdiction of that interest. Nor could Nancy or the South Carolina Court delegate any power to act for or bind her Connecticut land where neither could do anything to directly affect that land. How therefore can the plaintiff in error claim that Nancy's Connecticut interests were properly represented before the South Carolina Court, or that that Court took a proper jurisdiction of Nancy's interests in the Connecticut land?

The South Carolina Court did not try to determine any personal rights or personal relations, but the effect of the will

upon the lands of the estate, including the Connecticut land. The effect of the will upon the Connecticut land,—the status of that land and consequently the status of Nancy's interests in that land,—is claimed to have been determined by the South Carolina judgment, although Nancy's Connecticut interests were not and could not be properly represented before that Court, as is plainly shown by the fact that the South Carolina Court could not in any way act upon those interests or enforce any decree concerning them, either directly or by any coercion or act of Nancy herself.

How can the plaintiff in error claim that "In the South Carolina case every possible interest was represented?"

It is also obvious, that in such a question concerning the status of land, the guardian ad litem in the South Carolina Court and the guardian ad litem in the Connecticut Court, represented different interests, under different appointments, with different powers and responsibilities. That their interests were as different as their persons.

Neither as a matter of equity, should Nancy be bound in reference to the Connecticut lands simply because she was made a party to the South Carolina case. She had no full opportunity to protect her Connecticut interests. She could not act for herself or bring her rights to trial first in Connecticut. She could not make or urge any claim anywhere. The plaintiff in error acted in his own way, at his own time, before his own tribunal, where Nancy was represented only by a representative with a limited local authority, and with no title in or power to represent any property or right beyond the actual jurisdiction of that Court. It is not equitable for this plaintiff in error to claim that his infant daughter was equitably estopped by that determination, under the inherent limitations of such a situation, from referring her interests in the Connecticut lands, by a representation at the situs, to the Court there in control.

The Counsel for the plaintiff in error cite a number of cases in the first ten pages of their first brief as supporting their claim that the parties in the two proceedings were "sub-

stantially the same" and that "In the South Carolina case every possible interest was represented," but they in no way meet our above claim that Nancy, being an infant, could not submit any issue concerning her interests in Connecticut land to the South Carolina Court, either by her own act or appearance, or by any authority or act of a South Carolina guardian ad litem; or our claim that her Connecticut interests could not in any way be brought or represented within the jurisdiction or power of the South Carolina Court to affect them directly in rem or indirectly through any person whomsoever acting under its judgment or power.

Neither do they meet the objection that the daughter Julia's estate was not represented before the South Carolina Court. Even if there were no debts chargable against her estate and the father and infant sister were the final beneficiaries thereof, there was more than a mere distribution involved. There was the very question, whether these two were the immediate distributees, as heirs-at-law of real estate, or whether the estate was wholly personalty and in the nature of a chose in action, an unliquidated share of the mother's personalty or a claim against the executor of her will, where an administrator would seem to be a necessary party. Should not that interest have been represented in South Carolina? Should an administrator in Connecticut be bound by that incomplete collateral representation before the South Carolina Court?

The plaintiff in error claims that because Nancy and her father were the only heirs-at-law and next of kin of her sister, there was no necessity of any further representation of the sisters estate before the South Carolina Court; doubtless upon the claim that all the interests concerned were equitably represented. We claim again, that irrespective of the other interests, neither Nancy, nor her South Carolina guardian ad litem, had any power equitably or otherwise to represent there her interests in her sister Julia's estate which were in question in the Connecticut case.

Certainly the cases cited by the plaintiff in error do not support any claim that Henry P. Clarke's appearance as Exec-

utor and Trustee before the South Carolina Court, bound him as the administrator of Julia's estate under the subsequent appointment in Connecticut.

Neither do they pretend to support any claim that the appearance of Henry P. Clarke as Trustee for Nancy under the mother's will could in any way represent the interests of Nancy as a distributee of her sister's estate. Even if the Trustee could represent the cestui que trust, Nancy's interest from Julia was not under any trust, but absolute in her.

Their cases seem to be cited to the effect that the plaintiff in error, though acting only as executor and only at the expense of his wife's estate, was personally bound by the South Carolina judgment, which as is shown above, by no means meets our claim that the parties and interests were not the same; and is besides answered in that and other respects by the citations of our principal brief.

The complaint to, and decree of the South Carolina Court properly related to the construction of the will and the powers and functions of the executor, only in so far as he had been qualified by the South Carolina Probate Court to administer the estate within that jurisdiction. But the plaintiff in error claims here, that that decree bound him individually, as well as in his capacity as executor, because he was that executor, and bound him individually not only as to those interests within the scope of the issues of the action, but also as to his individual interests which were entirely without and beyond every issue which the plaintiff executor could raise;—not only as to any defense, o further support to the plaintiff executor, he might have made or given in his individual interest, but also as to any interest he might individually claim in Connecticut lands, though entirely outside of every issue properly raised under the complaint, or properly within his powers or functions as executor under his South Carolina qualification.

The following appear to be the more important cases cited by counsel for the plaintiff in error in support of their above claim that the parties were the same; or rather to the one point

that the plaintiff in error was bound individually by the South Carolina judgment in his favor as executor.

1. **Maingault vs. Deas, Baileys Eq., 283.** (1st brief, p. 5).

   In this case the pleadings of the defendant bank made Mrs. Deas a party to the first suit as "Executrix" also, hence she was bound upon *the face of the record* in that capacity as well.

2. **Small vs. Small, 16 So. Car., 64.** (Pl. 1st brief, p. 6).

   In this case both judgment and execution ran against the defendants de boniis propriis, hence their individual property was necessarily liable.

3. **Verner vs. Bookman, 53 So. Car., 398.** (1st brief, p. 6).

   The judgment only affected the administrator individually after he neglected to obey it officially and so became guilty of a devastavit.

On page 7 of their first brief it is claimed for the plaintiff in error that a judgment against an executor binds him individually as a devisee or distributee. See, *contra*, Bank vs. Good, 21 W. Va., 455, 461.

4. **Markley vs. Singletary, 11 Rich Eq., 393.** (1st brief, p. 7).

   Holds that where infant has been dead 20 years the presence of an administrator is desirable but not indispensible. In the case at bar they found it indispensible.

5. **Morton vs. Packwood, 3 La. Ann., 173.** (1st brief, p. 8).

   The remarks quoted must be purely obiter, for it is stated, p. 174, that any doubt as to whether the executor was not also in his individual capacity a party to the suit, is removed by the fact that he took the appeal on which the judgment was rendered *in his individual capacity*.

6. **Denegre vs. Denegre, 33 La. Ann., 689.** (1st brief, p. 8).

   It would seem that the widow by answering in the manner stated had made herself a party individually.

7. **Fouche Assignee vs. Harrison, 78 Ga., 410.** (1st br., p. 9).

The remarks quoted are eloquent and emphatic but far aside from the real point of the case.

The case only decides that an executor who has enjoined certain of his creditors from taking his legacy while asking the Court to say whether they or the creditors of the testator are entitled to it, cannot, pendente lite, assign it to others. This opinion furnishes a good example of expressions in the interpretation of which local light is desirable, for the judge delivering the above decision adds "the Court will not hold while he skins."

8. **Donifelser vs. Heyl, 52 Par. Rep., 468.**
Colton vs. Onderdonk, 69 Cal., 155.
Stewart vs. Montgomery, 23 Pa. St., 410.
(Small vs. Flint, 10 Mass., 128, not found as cited).
Kerrison vs. Stewart, 93 U. S., 155.
Corcoran vs. Canal Co., 94 U. S., 741.

Five cases cited for plaintiff in error on page 10 of their first brief. They do not seem applicable to the case at Bar. The first three concerned executors who were sole devisees, in the matter of claims against the estate and their realty; where their every act was necessarily a representation of their own interests. The last two cases were concerning the validity of trusts, where the trustee properly and naturally represented the interests of the cestui-que-trust.

II.

The claim of the plaintiff in error that the sole *subject matter* and *res* of the South Carolina case, was whether or not an equitable conversion was effectively directed, irrespective of the lands concerned, is untenable, as shown in our principal brief. They cannot separate the construction of a disposition of lands in a will from the effect of that construction or disposition upon the lands concerned.

Or if they could in this case, then upon their own showing the South Carolina Court only held that Mrs. Clarke intended to have her lands converted into personalty, which could not estop the Connecticut Court from going on to say whether that intention was sufficiently expressed to accomplish its purpose under the rules of Connecticut law. The Connecticut law is, (Record folio 49); "No general residuary devise and bequest can be given such an effect as respects lands in Connecticut, unless from the whole scheme of the will or the particular language employed, a power of sale is clearly implied. Conversion is effected by sale. Equitable conversion is effected by a power to sell and a duty to sell. It is not enough to manifest an intent that lands shall pass as money, unless there is also, either in terms or by implication, a grant of the means of turning it into money."

The South Carolina Court either attempted to determine the question of whether or not there was an equitable conversion of the Connecticut lands, or its judgment did not go far enough to estop the Connecticut Court under the above claim of the plaintiff in error.

III.

The claim of the plaintiff in error that the question of whether or not the will effected an equitable conversions of the lands of the estate, is a question *in personam* and not one *in rem*, is equally untenable as to the res—the lands concerned.

There was no attempt to determine any personal right of any kind of any party in interest, or any relation of any one party to another, but solely whether the will worked an equitable conversion of that land.

Neither was there any determination directed to or towards or concerning any person or personal rights or relations, but solely that the lands of the estate were equitably converted by the will.

Where can the personal element come in? What else can it be than a determination of the status of land. It was not an equitable conversion of any person, or as between any personal

claims, or of any personal right, but an equitable conversion of land; simply and solely a change in the status of the land; and whatever the rights in the proceeds might be, as between the parties in interest, was left to follow from the terms of the will. There was no dispute about or determination of any question of personal right or succession under the will.

It was solely a question in rem as to status of the land concerned.

> "It is true that, in a strict sense, a proceeding in rem, is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein."
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> Pennoyer vs. Neff, 95 U. S., 714, 734.

And besides, no matter how it be regarded, whether as a question in personam or one in rem, the South Carolina Court did not have before it or within its power, any person or thing through whom or upon which, it could enforce any judgment involving the Connecticut lands.

The authorities cited on pages 16 and 17 of his first brief seem to be relied upon by the plaintiff in error in support of his above claim.

These are chiefly:

1. **Stoff vs. McGinn, 178 Ill., 46.** (Pl. 1st brief, p. 16).

   In this case no ex-territorial question is involved. The land was in Illinois.

2. **Brown vs. Brown, 7 S. W. Rep., 648. 86 Tenn., 277.**

   This case is cited by plaintiffs counsel as holding that suits for the construction of a will are always proceedings *in personam*. Whether this may be sometimes true, we do not care to discuss. That it is always true, we emphatically deny.

The case itself was an action by and between parties in interest to determine *their* respective relations or rights to the decedents property under his will. It was a question of the relative rights of the parties concerned, and not like the case at Bar.

The Court, (p. 647) itself defines a proceeding *in rem* to be "an adjudication pronounced (as its name imports) upon the status of a particular subject matter, by a tribunal having competent authority for that purpose." Which is precisely what the South Carolina Court—a Court without the authority—tried to do in the case at Bar.

3. **Black on Judgments, Sec. 808.** (Pl. 1st brief, p. 17) cited for the plaintiff in error to the effect that a suit for the construction of a will is not in the nature of a proceeding in rem, cites as its only authority the above case of Brown vs. Brown.

Sec. 850 as cited on same page, concerns only a personal judgment against the parties previously rendered between the same parties.

Sec. 922 as cited on same page, cites as its only authority the case of Caruthers vs. Corbin, 38 Ga., 86, hereinafter considered under the next heading.

But that author also says Sec. 859, "The duty of the Courts of one State to follow those of another, upon questions arising from the construction of statutes of the latter, is a duty resting alone upon comity, and not one imposed by the federal constitution."

And in Sec. 636, "But a judgment admitting a will to probate in one state is not conclusive of its validity as a testament devising reality in another State, unless permitted by the laws of the latter State. For real estate is governed by the lex loci rei sitae, and all questions concerning it, including the validity of a will by which it is devised must be determined by that law."

In Sec. 792, this author includes among judgments in rem those included in the following definition by the Vermont Court:

"A judgment in rem is founded on a proceeding instituted, not against the person, as such, but against or upon the thing or subject matter itself whose state or condition is to be determined. It is a proceeding to de-

termine the state or condition of the thing itself, and the judgment is a solemn declaration upon the *status* of the thing, and it *ipso facto* renders it what it declares it to be."

4. **Freeman on Judgments, Sec. 608.** As cited for the plaintiff in error, cites the same case of Brown vs. Brown, supra, as its authority.

The same author says, Sec. 607: "A judgment or order distributing the estate of a decedent or ascertaining and naming his heirs * * is a judgment in rem." Sec. 609: "In decreeing the sale of the real estate of a lunatic or of a deceased person the Court may also act in rem."

5. **Freeman vs. Alderson, 119 U.S. 185.** (1st brief, p. 17).

This was an action to recover an undivided interest in certain lands, to obtain a partition of it and to have that interest set apart in severalty to the plaintiffs—p. 190 "a sort of mixed action to try the title of the plaintiffs to the undivided half of the property and to obtain a partition of that half. Such action, though dealing entirely with the realty, is not an action in rem in the strict sense of the term; it is an action against the parties named." p. 187, "Actions in rem strictly considered, are proceedings against property alone, treated as responsible for the claims asserted by the libellants or plaintiffs."

6. **1 Herman on Estoppel in Res Judicata 617.** (Pl. 1st brief, p. 17).

If the *whole section*, from which the quotation is taken for the plaintiff, be read, it sustains our contention.

IV.

How can the plaintiff in error claim the South Carolina Court had such jurisdiction of the parties that it was immaterial whether or not the real estate concerned was within its jurisdiction?

There is no evidence in the decree of that Court, of any order to any person holding title to those lands, to do anything;

or of any action by that Court, or intention on its part, towards compelling or even suggesting any transfer or act by any one, excepting the Executor, to effect a sale of the foreign real estate. There is no evidence anywhere that the South Carolina Court intended or had to confine its jurisdiction over the Connecticut or any other lands of the estate to its hold upon the distributees of the lands, but it in set terms directed the Executor himself to sell all the lands irrespective of every other interest or party. Does the plaintiff in error claim, that because the father and daughter who owned the Connecticut land were before it, the South Carolina Court could conclusively determine their rights in that land by any order or personal coercion towards them ? There was no way by which the South Carolina Court could compel Nancy to make any sale or transfer of her Connecticut realty. She could not do it herself and no one but a personal guardian acting under a Connecticut appointment and Connecticut law could do it, and he certainly would not be authorized to do it because of any order of the South Carolina Court, to transfer the proceeds to South Carolina.

The plaintiff in error appears to possess courage for the situation, and boldly claims that the power of the South Carolina Court to enforce its judgment was not a test of the validity of that judgment in Connecticut.

> We refer him, for answer, to Johnson vs. Mallory, 74 Cal., 430, 432; "Courts should not render judgments which cannot be enforced by any process known to the law."
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> And to Dicey on Conflict of Laws, p. 215. "The rule is now well established * * * which as already explained, forbids a court to give judgments which it cannot render effective, or which it can render effective, only by interfering with the authority of a foreign sovereign or the jurisdiction of a foreign court."
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> And to Aspden vs. Nixon. 4 How., 499, to the effect that the title cannot be separated from the property.
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> And to the law of his own State--Riddle vs. Reese, 53 So. Car., 198, that a judgment rendered by a Court without jurisdiction is a nullity although the defendant appeared, answered and went to trial without objection.

The plaintiff in this connection seems to rely upon the following cases to support his above claim:

1. **Arglass vs. Muschamp, 1 Vernon, 75.** (Pl. 2 br. p. 6).
   Kiddare vs. Eustace, 1 Vernon, 419. (1 br. p. 14; 2 p. 6).
   Toller vs. Carteret, 2 Vernon, 494. (Pl. briefs, id.

All cases where the Court acted through the parties which were before it.

2. **Penn vs. Lord, Baltimore, 1 Ves. Sr. 444.** (Pl. 1st brief, p. 14; 2nd, p. 6.)

Also a case where the Court acted through the parties upon their own submission.

> The Court says, p. 454: "As to the Courts not enforcing the execution of their judgment; if they could not at all, I agree, it would be in vain to make a decree, and that the Court cannot enforce their own decree *in rem* in the present case.
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> In the case of Lord Anglesey, of land lying in Ireland, I decreed for distinguishing and settling the parts of the estate, though impossible to enforce that decree in rem; but the party being in England, I could inforce it by process of contempt in personam and sequestration, which is the proper jurisdiction of this Court. And indeed in the present case, if the parties want more to be done, they must resort to another jurisdicton.

3. **Massie vs. Watts, 6 Cranch, 160.** (Pl. 2nd brief, p. 6).

This case follows the case above of Penn vs. Lord Baltimore, 1 Ves. 444 and bases its jurisdiction upon its control of the parties. We do not need to distinguish such cases.

The plaintiff in error however should have added to his quotation; "The inquiry therefore will be whether this be an unmixed question of title, or a case of fraud, trust or contract." The Chief Justice takes pains to state, p. 169, that if it be "an unmixed question of title," (as it is in our case), the foreign Court cannot act.

4. **Mills vs. Duryea, 7 Cranch, 481.** (Pl. 2 br., p. 4–6).

We do not claim that nil debet is a good plea to an action founded on a lawful judgment of another state, or that a lawful judgment of the South Carolina Court need not be given such faith and credit in Connecticut as it receives in South Carolina, but we do claim, what the above case assumes, that the South Carolina judgment, to be entitled to such faith and credit, must have been a *lawful* judgment *within the jurisdiction of that Court*, and that that jurisdiction could be inquired into in Connecticut.

In the case of Rose vs. Himely, 4 Cranch, 241, 260, Chief Justice Marshall had already said:

"Upon principle, it would seem that the operation of every judgment must depend on the power of the Court to render that judgment; or in other words, on its jurisdiction over the subject matter which it has determined. In some cases, that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the Court." "Upon principle, then, it would seem that, to a certain extent, the capacity of the Court to act upon the thing condemned, arising from its being within, or without their jurisdiction, as well as the constitution of the Court, may be considered by that tribunal which is to decide upon the effect of the sentence."

5. **Hampton vs. Connell, 3 Wheaton, 234.** (Pl. brief, id).

This case follows Mills vs. Duryea above and presupposes a valid judgment.

6. **Morton vs. Naylor, 1 Hill (S. C)., 439.** (Pl. brief, id).

An earlier South Carolina case than the one at Bar. It very properly follows Mills vs. Duryea above upon a similar question. It fully supports our reference to the application of that case and adds p. 445.

"No evil is to be apprehended from such a decision. The question whether the Court had jurisdiction of the person of the defendant or of the subject matter of the suit, will remain open to investigation. If the Court pronouncing this judgment had no jurisdiction of the

subject matter, the judgment would be necessarily void; if it had no jurisdiction of the person of the defendant, it could only operate in rem, and could not create a debt, by judgment against the defendant, to be enforced in another state."

7. **Burnley vs. Stevenson, 24 Ohio St., 477.** (Pl. 1st brief, p. 14).

We also have cited this case in our principle brief as an authority in distinguishing the plaintiffs claim from the case at Bar.

We understand this case to hold: That while a Court can compel a specific performance of a contract in relation to lands situate in another State, after having obtained jurisdiction of the persons of those upon whom the obligation rests, it could not make its own decree operate as a conveyance of those lands, because a judgment or decree in rem cannot operate beyond the local jurisdiction, nor could it make such a transfer through any master, commissioner or agent under its appointment or authority, but it could compel the performance of its decree by coercion of the parties before it, who confessedly owned and could control the land and its title, acting upon them in personam. How does this support the jurisdiction of the South Carolina Court in the case at Bar? The latter Court did not attempt to coerce the parties or to act upon them in personam in any way. Nancy could not, if she would, and therefore could not be made to carry out any such decree as to the Connecticut lands; and the South Carolina Court could not convert this land by its decree, or for her, by its own act or through any appointee or agent.

Even if they were to retain Nancy under a personal South Carolina control until she became of age, a Connecticut guardian could nevertheless, meantime, make a different and lawful sale and conveyance of her interests there.

8. **Carruthers vs. Corbin, 38 Ga., 75, 86.** (Pl. 1st brief, p. 15).

This was a case concerning the distribution of *personal* property under a will as that distribution had been determined by the Court of the domicile.

The Court also says, p. 86: "We fully recognize the rule here contended for, that this state will not enforce the laws of another state, which contravened the policy of our laws; but this case does not fall within the rule * * *

We are not called upon to enforce any illegal provisions of the will."

In the above case it was merely a question of personal rights in personal property; in the case at Bar it was a question whether the Connecticut Court must by its necessary process actually enforce a testamentary disposition of Connecticut real estate against its own laws.

9. Owens vs. Ohio, Cen. R. Co. 20 Fed. Rep. 10. (Pl. 2d brief, p. 9).

This and other cases in the same connection are cited for the plantiff in error to support his apparent claim that jurisdiction of this will as to part of the estate carries jurisdiction over the whole estate wherever situated, and that the South Carolina Court having taken jurisdiction first, is the proper Court to construe and determine the effect. We do not question the fact that process was served, suit begun and judgment rendered, first, in South Carolina. In fact the defendant in error was too young to bring a suit anywhere, and was dependent upon the plaintiff to determine their respective rights, as and when he chose.

How can these facts help the plaintiff in error here in a determination of the status of Connecticut lands?

The principal case above also holds, (p. 15): "This is a trust estate, and must be administered as an entirety for the protection of all concerned."

The case at Bar cannot be twisted into any similitude. It is neither such a trust; nor must it be administered as a whole. Under the will one-third was to go to the father absolutely and one-third to each of the two children, the one-third share of each child to be held in trust until she became 25 years of age or married. But Julia died before the case came into the South Carolina Court, thus terminating the trust for her, ipso facto, before it began, as is conceded, and her third interest was then and is intestate property.

The sole question in Connecticut was whether this last intestate third, so far as it lay in Connecticut, had been converted into personalty under the mother's will. There was no trust attaching to it nor any trustee accountable for it. Even if the plaintiff's contention were right, the trustee directly concerned would be the administrator in Connecticut accountable to the Connecticut Court.

10. Dehon vs. Foster 4 Allen 545. (Pl. 2d brief p. 7).

p. 551 "It (the case) is simply a controversy as to the relative rights of citizens of our own state to personal property belonging to insolvent debtors who are also domiciled here."

The able counsel for the prevailing party in this case, Messrs. G. F. Hoar and H. Gray, Jr., very happily expressed the true bearing of all these similar cases cited by the plaintiff: p. 547 "The jurisdiction of a Court of Equity (*excepting where declaring rights in or affording protection to real estate*) is *in personam* and not *in rem*, and is not impaired by the fact that the property is beyond the jurisdiction, if the defendant is within it."

We are clearly within the above exception and have no occasion to distinguish this case.

11. Brown vs. Desmond, 100 Mass., 269. (Pl. 1st brief p. 15).
Lewis vs. Darling, 16 How., 16. (Pl. 2d brief, p. 9).
Cheever vs. Wilson, 9 Wall., 121. (Pl. 2d brief, p. 8).
Green s. Van Buskirk, 5 Wall., 307, 7 Wall., 199. (id).
Phelps vs. McDonald, 96 U. S., 298. (Pl. 2d brief, p. 7)
Hart vs. Sansom, 110 U. S., 154. (Pl. 2d brief, p. 8).
Cole vs. Cunningham, 133 U. S., 119. (Pl. 2d brief, p. 8)
Carpenter vs. Strange, 141 U. S., 87. (Pl. 2d brief, p. 8).

As cited for the plaintiff in error, merely establish the well understood doctrine, that a court of equity acting directly upon the parties before it, may enforce a decree in personam by personal coercion, though it indirectly affects property in another jurisdiction.

We have already cited and quoted some of these same cases to this effect in our principal brief, and we add these further quotations:

"Where the necessary parties are before a court of equity, it is immaterial that the res of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the lex loci rei sitae, which he could do voluntarily, to give full effect to the decree against him.

Without regard to the situation of the subject matter, such courts consider the equities between the parties, and enforce obedience to their decrees by process in personam."

Phelps vs. McDonald, 99 U. S. 298, 308.

"The real estate was situated in Tennessee and governed by the law of its situs, and while, by means of its power over the person of a party, a Court of Equity may in a proper case compel him to act in relation to property not within its jurisdiction, its decree does not operate directly upon the property, nor affect the title, but is made effectual through the coercion of the defendant, as for instance, by directing a deed to be executed or cancelled, by or on behalf of the party. The Court 'has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title,' Hart vs. Sansom 110 U. S. 151, 155."

"Hence although in cases of trust, of contract and of fraud, the jurisdiction of a Court of Chancery may be sustained over the person, notwithstanding lands not within the jurisdiction may be affected by the decree, (Massie vs. Watts, 6 Cranch 148) yet it does not follow that such a decree is in itself necessarily binding upon the Courts of the State where the land is situated.

To declare the deed to Mrs. Strange null and void, in virtue alone of the decree in New York, would be to attribute to that decree the force and effect of a judgment in rem by a court having no jurisdiction over the res."

Carpenter vs. Strange, 141 U. S. 87, 105.

12. Bullock vs. Bullock, 52 N. J. Eq., 561, 27 L. R. A., 213. (Pl. 2d brief p. 11).

We have no occasion to distinguish the conclusions of this case. The opinion of the majority of the Court

supports our claims, and Judge Garrison also would evidently have limited the South Carolina decision to its effect upon the South Carolina land. Even the actually dissenting opinion only claimed that the husband was equitably bound to do as he was ordered by the New York Court, and that though (p. 575) "The lien does not, by mere force of the exterritorial judgment, attach to lands in this State, * * * The husband has had his day in Court in New York * * * and our courts should hold that he is hereby concluded."

We add these quotations from the opinion of the Court:

P. 564; "The order simply required respondent to perform the decree by executing, acknowledging and delivering to appellant a mortgage on particular lands in New Jersey, of a form shown in a schedule annexed to the order. The order and requirement of the Court was therefore directed in *personam*, and there was no attempt to adjudicate or enforce an adjudication *in rem*.

"It is scarcely necessary to observe that a Court of New York could not have been empowered to affect, by its decree of judgment, lands lying within another state; for no principle is more fundamental or thoroughly settled than that the local sovereignty, by itself or its judicial agencies, can alone adjudicate upon and determine the status of lands and immovable property within its borders, including their title and its incidents and the mode in which they may be charged or conveyed. Neither the laws of another sovereignty, nor the judicial proceedings, decrees, and judgments of its courts, can in the least degree affect such lands and immovable property. Story, Confl. L. pp. 543, 591. The concession as to the jurisdiction of the Supreme Court of New York in this case must therefore be deemed to be limited to a jurisdiction to proceed *in personam* and not to extend to a determination, adjucation or decree *in rem*. The jurisdiction thus conceded to the Supreme Court of New York is exactly analogous to the jurisdiction which, since the decision of Penn vs. Lord, Baltimore, 1 Ves. Sr. 444, has been universally recognized as inherent in Courts administering equity.

"This recognized jurisdiction extends to making decrees in cases of equitable cognizance, such as fraud, trust and specific performance against persons brought

into those Courts, notwithstanding such decrees incidentally affect lands beyond the court's jurisdiction. But the exercise of this jurisdiction has been supported solely on the ground that it operated *in personam* only, and did not extend to the utterance of decrees *in rem*. In the leading American case, Chief Justice Marshall declared that the question was an unmixed question of title, or a case of fraud, trust, or contract. Massie vs. Watts, 6 Cranch 148. If relief cannot be effectively given by the decree *in personam*, such Courts will not retain the bill. Morris vs. Renington, 1 Pars. Sel. Eq. Cas. 387; Lindley vs. O'Reilly, 50 N. J. L. 636. Nor will the power be exerted *in personem* to compel an act affecting lands in another jurisdiction of doubtful legality. Blount vs. Blount, 8 N. C. 365. The power of such Courts to make effective such decrees is limited to its process operative upon the party, such as sequestration of property within the jurisdiction, attachment for contempt, and the like; it will not extend to validating a conveyance of the foreign lands, made by its master or commissioner, in default of the performance of the decree by the party. Watts vs. Waddle, 6 Pet. 390, Burnley vs. Stevenson, 24 Ohio St. 474. When by the process of the Court acting upon the party, obedience to the decree is enforced as by the conveyance, it is the conveyance, not the decree that affects the lands in the foreign jurisdiction. Davis vs. Headley, 22 N. J. Eq. 115" * * (p. 567) "But the question upon the solution of which this case must turn is whether the courts of New Jersey must give conclusive effect to the decree or judgment of the courts of New York made in a case where they had acquired jurisdiction of the parties but affecting lands situated here, and disposing of the title thereto in whole or in part. If this question is to be answer in the affirmative, it seems evident that we accord jurisdiction over lands in New Jersey to the Courts of other states, and, as was said by Chancellor Zabriskie in Davis vs. Headley, supra. 'leave to the courts of this state only the ministerial duty of executing their decree?' for the doctrine that jurisdiction respecting lands in a foreign state is not *in rem* but only *in personam*, is bereft of all practical force if the decree *in personam* is conclusive, and must be enforced by the Courts of the situs. If such is the effect which must be given to the judgments

and decrees of the courts of a sister state respecting lands situated here, it is extraordinary that no trace of the doctrine can be found in text-books or in adjudicated decisions. My researches have not disclosed any support of the doctrine by any text-writer of repute or by any decision in point. The very industrious counsel who maintained this view in argument has produced no authority, which in my judgment, sustains his position."

V.

The plaintiff in error is forced to claim that the South Carolina Court, as the Court of the domicile, could conclusively determine the interpretation, construction and effect of this will as to all the lands of the estate wherever situated; and he cites a number of authorities which he insists support that claim.

This claim was made and most of these cases were cited for him before the Connecticut Court. We have considered his claim at length in our principal brief, pages 23 to 47, and have also distinguished there, pages 50 to 70 the following of his citations:

Ford vs. Ford, 70 Wis., 19. (Pl. 1st brief, p. 15).
Story on Conflict laws, Sec. 479 a-h. (1 br. p. 15; 2 p. 13).
2 Greenleaf on Evidence, Sec. 671. (Pl. 2d brief, p. 16).
Van Steenwyck vs. Washburn, 59 Wis., 510. (1 br. p. 15).
Harrison vs. Nixon, 9 Peters, 404. (1 br. p. 15; 2 p. 13, 21).
Trotter vs. Trotter, 4 Bligh, (N. S.) 502. (1 br. p. 15).
Chamberlain vs. Napier, L. R. 15, Ch. Div., 614. (id).
Caulfield vs. Sullivan, 85 N. Y., 153. (2d br. p. 14).
Dammert vs. Osborn, 140 N. Y., 30. (1 br. p. 23).
Maxwell vs. Maxwell, 2 D. M. & G., 705. (2 br. p. 15).
Orrell vs. Orrell, L. R. 6 Ch., 302. (Pl. 2d brief, p. 15).
Guerard vs. Guerard, 73 Ga., 506. (Pl. 1st brief, p. 23.)
Donelli vs. Donelli, 4 Bush, 51. (Pl. 1st brief, p. 23.)

We add as to the other citations now made by the plaintiff in error in connection with his above claim:

I. The Amer. & Eng. Ency. Law Vol. 3, is referred to by his counsel upon one or two points, but their

quotations therefrom must be reconciled with the following quotation from the same book, page 565, to give them any application.

"All instruments and contracts conveying or affecting the title to real estate must be executed in the form and with those solemnities prescribed by the law, where the land is situated, in order to have any validity; and such contracts and instruments are to be *construed* and *given effect to* by the law of the situs."

We also call attention to the qualification admitted by **Bigelow in his note to Story on Conflict of Laws, 651,** as quoted for the plaintiff in error: "In such a case, the question being simply one of the *intentions expressed* in the will and not of the *validity* of the *dispositions*, it is evident that the word expresses the same intention as to all the property or real estate whereever it may be."

2. **Anstruther vs. Chalmer, 2 Sim. 1.** (Pl.2d br.p.15). This case concerned personal property only. And may we not besides deem it an authority in our favor? The will being one of personalty only, was construed by the law of the domicile, and not by the law of the place where made whose technical provisions were employed, presumably (under those circumstances), because the law of the domicile was to govern in the disposition of the estate. Under that case, mutatis mutandis, would not a will of real estate be construed by the law which governs the disposition of the realty, whether or not any provisions might have been taken from the law of the domicile?

3. **Story on Equity, Sec. 744,** cited for the plaintiff in error, (2d brief, p. 17) to the effect: "The incapacity to enforce the decree in rem constitutes no objection to the suit," also says, earlier in the same section, by way of a premise: "It is sufficient that the parties to be affected and bound by the decree are resident within the state or county where the suit is brought;" and in Sec. 744, (a) (12th Ed.) "It has recently been determined in America after a full review of all the authorities, that a Court of Equity has no jurisdiction in cases touching lands in foreign countries, unless the relief sought is of such a nature as the Court is capable of administering in

the given case; a Court of equity has not necessarily jurisdiction over a subject of ordinary Equity cognizance, simply because the parties are within the forum."

4. McGregor vs. McGregor, 9 Iowa, 65. (Pl. 2d brief, p. 19-20.) This case is cited and quoted from in behalf of the plantiff in error; but taken in connection with the later cases of Acker vs. Priest, 92 Iowa, 610, 616, and Blackman vs. Wright, 96 Iowa 541, we think they will prove authorities in our favor.

5. I. Redfield on Wills Chap. IX, Sec. 15, p. 405. (Pl. 2d brief, p. 20), is quoted for the plaintiff in error to the effect that the law of the domicile will govern as to what shall be regarded as personal and what real estate. How would this be applied in this case? There could be no question as to the physical character of the Connecticut lands before the judgment of the South Carolina Court. Will the plaintiff in error claim, that this author would give the South Carolina Court jurisdiction of the Connecticut lands, to determine the effect of the will upon those lands and whether they were converted by the will from real to personal property, because as the Court of the domicile it could determine whether the property of the estate *to be acted on by the will was in fact real or personal property?*

How would the plaintiff in error reconcile such a claim with the other rule previously stated by this author in Section 8, p. 398; "It is scarcely necessary to state, that in regard to real property, the mode of execution, *the construction*, and the validity of a will must be governed, exclusively, by the lex rei sitae."

Or with the law of his own State—Lamar vs. Scott, 3 Strob. (S. C.) 562—to the effect that the lex loci rei sitae governs where the controversy relates to "what are to be deemed immovables."

6. Perkins Note to 1 Jarman, 1-2d Amer. Ed. (Pl. 2d brief, p. 22), is cited as dissenting from the text, as to the law of what place governs the interpretation and construction of wills, and is claimed to agree with the plaintiff's view, that the law of the domicile governs. In the 5th Amer. Ed. p. 2, the same note appears,

"Quaere, whether this statement (of the text) is not too broad as to the construction of such wills." And 2 Greenleaf Ev. Sec. 671, and Story Conflict Laws, Sec. 479 h are cited as the cause of the queary; but the note goes on to say: "It would seem to be settled now however in England and the United States, that in matters that concern the succession to personalty, the lex domicilii of the deceased is to control, while on the other hand it is maintained that as far as the descent and heirship of reality is concerned, the lex rei sitae determines it finally."

Schouler on Wills, 2d Ed. reaffirms Jarman's text by referring to that author and Judge Story among his authorities for the following rule which he gives:

Sec. 491. "Real and personal property are to be distinguished in the interpretation of a will. As to real property, the well settled rule of England and the United States is, that, no matter where the will was made or in what language written, the law where the land lies must govern in the construction of the will as well as in its method of execution."

7. **Mullen vs. Reed, 64 Conn., 247.** (Pl. 2d brief, p. 20). **Rockwell vs. Bradshaw, 67 Conn. 14,** (id).

These cases are readily distinguishable in principle and application from the case at Bar, as will be seen from a more extended examination. The very case in question here, Clarke vs. Clarke, 70 Conn., 195, must be conceded to be both later and more nearly in point. The Connecticut court in this later case did not deem it needful to distinguish those former decisions.

8. **McElrath vs. Pitts. & Steub. R. R. Co., 55 Penn. St. 189.** (Pl. 2d brief p. 22.)

The Court in its opinion seems to understand better than the plaintiff in error what it attempted to do:

P. 209. "Without deciding what estate would pass by the trustee's sale under the mortgage, we are of opinion that we can by our decree operating upon the trustee, authorize and compel him to sell and convey

whatever interest of the railroad company will pass under the terms of the mortgage."

The later case of Lynde vs. Columbus C. & I. C. Ry. Co. 57, Fed. 993, shows the limited application of such action, and we refer to it as a well fortified authority upon the power of foreclosing such mortgages.

We also in this connection cite the case of Pitts. & State Line R. R. Co. vs. Rothschild 1 Pa. C. C. R., 620, 4 At. Rep. 385, 4 Cent. Rep. 107, a later Pennsylvania case which shows an extended examination of the authorities upon this point.

9 Muller vs. Dowes, 94 U. S, 444. (Pl. 2d brief, p. 22.) This case is also cited for the plaintiff in error to support his claim of foreign control of local real estate by foreclosure.

The Court says, p. 449: "It is here undoubtedly a recognized doctrine that a Court of equity sitting in a state and having jurisdiction of the person, may decree a conveyance by him of land in another state, and may enforce the decree by process against the defendants. True it cannot send its process into that other state, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title."

How would the plaintiff in error apply this authority? How would he compel Nancy to transfer her Connecticut real estate? She herself cannot do it. A South Carolina decree cannot do it; neither can a South Carolina guardian; nor even a Connecticut guardian excepting by authority of a Connecticut Court and Connecticut law, which would not authorize such a transfer to South Carolina. Would he have the South Carolina Court imprison Nancy until she becomes of age? How would he restrain her Connecticut guardian meantime?

10. Adams vs. Farley, 18 So. Rep. 391. (Pl. 2d brief, p. 23). In this case personal property only was involved.

11 Crusoe vs. Butler, 36 Miss. 150. (Pl. 1st brief, p. 22.) This case has been already distinguished in our principal brief, p. 62, and in the opinion of the Connec-

ticut Court, but the Counsel for the plaintiff in error seem to lean so hard upon that slender and twisted prop that we cannot refrain from touching it again as we pass. However much they may claim the Mississippi Court yielded here to a previous interpretation of the testator's meaning by the Alabama Court in a suit between the same parties or their privies, they must reconsider their claim with the following conclusion also stated in the same opinion.

P. 168: "It is not to be supposed that it was the intention of the Act of Congress to give another State presumed to be unacquainted with the laws of the State where the lands are situate the power to establish a conveyance and by the judgments of its Courts render it effectual to pass the title; for that would give to a foreign tribunal power to establish a conveyance and adjudge the title to land in another state contrary to the positive laws of that state.

It is much more reasonable to suppose that the act was intended to apply to judicial proceedings affecting rights of a *personal* or transitory character and this we consider the proper construction of it."

In this connection it is interesting to note that the misapplied expression in this Crusoe vs. Butler case upon which the plaintiff in error relies, apparently afterwards became troublesome in Mississippi, for the subsequent decisions and the subsequently enacted code, referred to bottom p. 63, and top p. 64, of our principal brief, have put a summary end to its adventitious authority there.

We also call attention to another earlier and clearer statement of the Mississippi law, in the case of Doe vs. Wynne, 23 Miss. 251, which was in no way distinguished or modified in the later case above, but is doubtless the law of that state today.

P. 253: "As the land is situated in this state, the rights of the parties to it must be determined by the law of Mississippi, although the testator was domiciled in Tennessee at the date of the will, and at the time of his decease."

P. 256: "The argument has been pressed upon us, that as by the law of Tennessee at the date of the will, the

testator can not devise after-acquired land, we must presume that it was not his will or intention that they should pass by the devise. But this argument is not entirely tenable. The cases in the books are numerous where the intention of the testator to convey was manifest, but where that intention could not prevail, because it controverted the case."

P. 257: "But it is clear to our minds, that, as the will manifestly shows, that the intention of the testator was to give to his wife all the property of which he might die seized, whether owned at the date of it, or subsequently acquired, that intention must prevail and be carried into effect by the Courts of this state in regard to realty situated here, there being no question whatever that the power existed under our laws to make such a will. We are therefore of opinion that the defendant in error is entitled by the laws of this state to the lands in controversy."

12. **Levy vs. Levy,** 33 N. Y., 97.

Virginia vs. Levy, 23 Gratt. (Va.), 21 (Pl. 2d br. p. 18-9).

The second of these two cases concerning the same will is cited for the plaintiff in error in support of his claim that the Court of the domicile may construe a will of foreign real estate.

A large amount of real and personal property in New York and the plantation of Monticello in Virginia were given by a New York will to the United States in trust for certain purposes. If the United States would or could not undertake the trust, the State of Virginia was named as Trustee in its place. The executors brought suit in New York for a determination (inter alia) of the validity of this trust. All persons in interest including the United States appeared and were made parties. The United States appeared and defended the validity of the trust provision.

The New York Court said in part, p. 136:

"The subjects of the trust are the real estate (Monticello) in Virginia, and real and personal estate in New York. The validity of the devise of the land in Virginia depends on the law of that State. As to the estate real and personal, in New York, it depends on the law of New York, because as to the real, New York is the locus rei

sitae; as to the personal, the locus domicilli. The law either of Virginia or New York being hostile to the limitation, it is, I think, wholly void. The testator's plan embraces and requires *all* the property.

* * * * * * * * *

"It was proved upon the trial and found as a fact by the Judge, that according to the law of Virginia a trust in lands, such as the one in question, is void." * * *

"My conclusions are that the devises and bequests of the residue of the real and personal estate of the testator (being the lands and personal estate in New York), upon the trust specified in the will, are invalid for the reasons": [1st. The disposition violated legal rules. 2nd. There is no competent Trustee. 3rd. The disposition creates a perpetuity]. "4th. The bulk of the property devised and bequeathed (the lands in this State) is subjected to a trust that cannot legally be created. 5th. The devise of the farm and estate at Monticello, in Virginia, the designated site of the school, is by the law of that State void.

By the law both of New York and Virginia, the trust limitation is invalid. It were quite enough, however, that the law of this State is in hostility to it. The trust failing as to the real and personal estate in New York appropriated to erect, endow and maintain the school, the devise of the Monticello farm in Virginia, as the site of the institution, fails also. The purpose and intent of the testator cannot be effectuated, and therefore every part of the scheme fails."

Some of the heirs, after the war, brought suit in the Courts of Virginia for the disposition of the real estate there as not affected by the trust. To this case the State of Virginia was made a party. The Virginia Court held:

First, (p. 34). That the United States was a "Competent and sufficient" trustee, and had not declined the trust, but had apparently accepted it and therefore the State of Virginia had no interest in the matter.

Second, (p. 37). That the New York decision was conclusive everywhere as to the real and personal property in New York.

Third, (p. 38). That the trust provision being void as to the New York property became incapable of execution anywhere even if valid in Virginia. And, *lastly:* That

the New York decision was right in principle and correctly announced the Virginia law.

We fear that this case alone would not adequately establish our adversaries contention.

13. **Boyes vs. Bedale, 1 Hem. & M., 805.** (Pl. 2d brief, p. 24).

This is the last case cited for the plaintiff in error, and is a broken reed for them to rest upon. As stated in our principal brief, page 61, it was over-ruled in the subsequent case of Re Goodman's Trusts, L. R., 17 Ch. Div., 266, 299; and we add that it was subsequently over-ruled again, with additional emphasis, in Andros vs. Andros, 24 Ch. Div., 637.

The Counsel for the plaintiff in error claim that the case at Bar is the only case, so far as their investigation goes, which denies the jurisdiction of the Courts of the domicile to determine the title to lands in another state by a conclusive construction of the muniment of title.

We beg to again refer them, and this Honorable Court, to some of the goodly company supporting Connecticut in its contention. Some of the numerous other cases where its power to construe foreign dispositions of local real estate is either directly applied, or asserted by the Court of the situs.

1 Redfield on Wills, 398.
1 Jarman on Wills, 1.
Schouler on Wills, Sec. 491.
3 Amer. & Eng. Ency. Law, 565.
Wharton on Conflict of Laws, Sec. 555.
Dicey on Conflict of Laws, 527–8.
U. S. vs. Crosby, 7 Cranch, 115–6.
McCormick vs. Sullivant, 10 Wheaton, 192, 202.
Watts vs. Waddle, 6 Peters, 389, 401.
Watkins vs. Holman, 16 Peters, 25, 57.
Suydam vs. Williamson, 24 How., 427–33.
McGoon vs. Scales, 9 Wall, 23, 27.
U. S. vs. Fox, 94 U. S., 315, 320.
Brine vs. Ins. Co., 96 U. S., 627, 636.
DeVaughn vs. Hutchinson, 165 U. S., 566, 570.
Jennings vs. Jennings, 21 Ohio St., 56, 76.
West vs. Fitz, 109 Ill., 425, 440.
Smith vs. Smith, 174 Ill., 52, 58.

Lynch vs. Miller, 54 Iowa, 516.
Richardson vs. DeGiverville, 107 Mo., 422, 433.
Kerr vs. White, 52 Ga., 362, 370.
Tierson vs. Williams, 57 Miss., 451, 463.
Williams vs. Mans, 6 Watts, Pa., 278-9.
Nelson vs. Potter, 50 N. J. L., 324-5.
Davis vs. Headley, 22 N. J. Eq., 115.
Danner vs. Brewer, 69 Ala., 191, 203.
Cantu vs. Bennett, 39 Tex., 304, 309.
Williams vs. Nichol, 47 Ark., 254.
Sedgwick vs. Laflin, 10 Allen, 430.
Bovey vs. Smith, 1 Vernon, 84.
Brodie vs. Barry, 2 Ves. & B., 127.
Robinson vs. Bland, 2 Burr., 1077, 1079.
Nelson vs. Bridport, 8 Beav., 547, 570.
Freke vs. Lord Carberry, L. R., 16 Eq. Cas., 461, 5, 6
Harrison vs. Harrison, L. R., 8 Ch. App. Cas., 342.
Fenton vs. Livingston, 3 Marcq. App. Cas., (497, 548.)

We also add further references to some cases cited but not quoted in our principal brief. These cases support our contention either directly or by necessary implication—directly where the Courts of the domicile had already construed the will—by necessary implication where the Courts of the situs construed the will by their own laws without reference to the laws or decisions of the domicile.

And both classes of cases are equally in point, since the only reason given by the plantiff in error for the qualification of the usual rule is that the will was made with reference to the local conditions of the domicile—in this case its laws of construction—which conditions (laws), if they are to control at all, should be equally controlling whether the Court of the domicile has acted first or not.

White vs. Howard, 46 N. Y. 144. (1871).
White vs. Howard, 38 Conn. 342. (1871).

Two cases concerning the same will and estate. The testator was domiciled in Connecticut. The New York Court construed the will, so far as it concerned New York land, as to the question of conversion, whether the daughter took a

vested estate or merely a beneficial interest, and as to the validity of the devise in remainder.

The New York Court said in part:

> "In addition to his personal property and real estate situated in Connecticut, the testator at the time of his decease was seized of real estate situated in the city of New York of great valve. The validity of the devise of the latter property, and *all questions relating to the title*, must be determined by the laws and Courts of New York, irrespective of the domicile of the testator."

It was claimed that a power of sale was implied, and that all the property was converted under the will, and should therefore be disposed of under the Connecticut law. The Court thought, considering the bulk of the real estate was in New York, that if the testator intended a power of sale of it he would have expressed it; and after considering the question of conversion, concluded: "There can be no pretense of any conversion of the New York real estate under the rule in the present case."

The Court also held that moneys invested in New York real estate under the will must be treated as real estate. "In such cases we have seen that after the investment is in fact made, the nature of the property is changed, and that the heir, instead of the personal representatives, are entitled to it. International comity has nothing to do with titles to real estate. They are regulated exclusively by the government where the real estate is situated." The Court also held that certain New York societies could not (because of the Statute of Wills) take the devises in remainder.

The Connecticut Court did not question in any respect the propriety of such action by the New York Court, but held that the New York societies could take a devise of Connecticut lands, as there was no prohibition in their charters, and they had the power to hold and convey real estate.

Penfield vs. Tower, 1 N. Dak. 216. (1890).
Lee vs. Tower, 124 N. Y. 370. (1891).
In re Tower's Estate, 49 Minne. 371. (1892).

Three cases concerning the same will and estate. The testator was domiciled in Pennsylvania and owned land also in the other three States mentioned.

It was conceded that the trusts under the will were valid under Pennsylvania laws as to both personal and real estate.

The North Dakota Court held that if this land was converted under the will it was for the Courts of Pennsylvania—the testator's domicile—to decide as to the validity of the trust in question; but if there was no conversion, it was to be decided in the local Court. The Court considers the question of conversion at considerable length, under its own laws, and concludes:

> "We therefore hold that the real estate was not equitably converted into personalty; that the trust as to the real property within this State is to be construed by the laws of this State; and that under those laws it is void because it unlawfully suspends the absolute power of alienation."

The New York Court said in part as to the validity of the trusts and the question of conversion:

> "We agree with the conclusion reached by the learned General Term, as well as the reasoning on which it was founded."

And upon this point the General Term said in part: (Lee vs. Tower, 12 N. Y. Supp. 240, 58 Hun. 606 *Mem*):

> "That the provisions of the will in question are repugnant to this statute (perpetuities), and the trust therefore invalid, as one relating to real estate, * * * is practically conceded by the defendants. They, however, claim that this is a case where the doctrine of equitable conversion should be applied, so that the will should be construed as if the whole estate were personalty, and that upon this theory the law of the State of Pennsylvania would govern in the construction, and the trust under that law be valid. * * * It seems to be conceded on the part of the plaintiffs that, if there is an equitable conversion, the will is governed by the law of Pennsylvania, and therefore valid. The question to be determined, therefore, is whether or not there is here an equitable conversion."

Then after citing and applying a number of precedents, wholly New York cases, the Court concluded:

> "The foregoing considerations lead to the conclusion that there is here no sufficient basis for saying that the testator intended that his real estate should at all events be sold and converted into personalty," and as there was no equitable conversion held the trusts invalid under the statue against perpetuities.

The Minnesota Court considered that the will would not be invalid in Minnesota as to personal property, or as to Minnesota lands if the trustees had an absolute power of sale, saying in part:

> "The power to sell and convert the real estate was a necessary complement to the provisions of the will for the management of the estate. If the power of alienation by the trustees is to be treated as equivalent to that of the absolute owner of the real estate, then there is no suspension of the power of alienation." * * *
>
> "When the trustee is empowered to sell the land without restriction as to time, the power of alienation is not suspended, although the alienation in fact may be postponed by the non-action of the trustee or in consequence of a discretion reposed in him by the creator of the trust." * * * "Hence we conclude that the trust was not invalid, because it was lawfully constituted as to the personalty, and as to the lands also not in contravention of the statute, for the reason that they are convertible at any time by an authorized sale."

Counsel for both sides cited the decisions concerning the same will in North Dakota and New York, and distinguished or relied upon them according to their respective interests, but neither seemed to consider them as controlling authorities.

It will be noticed that neither of the three Courts of North Dakota, New York and Minnesota, in the principle cases, considered it needful or appropriate to either refer the question of conversion to the Pennsylvania Court, (the domicile), or, in deciding the question themselves, to attempt to apply the Pennsylvania laws.

Applegate vs. Smith, 31 Mo. 166 (1860).

By a will executed in Kentucky a testator domiciled there devised to his wife his whole estate, real, personal and mixed "wherever situate." He subsequently acquired lands in Missouri.

The Court said in part:

"The only material point in this case is whether the after-acquired lands passed by the devise to Martha Applegate.

"The will was made in Kentucky, and by the law of that State there must be something in the will itself which showed that after-acquired lands were intended to be passed by it in order that it may have that effect.

"A general devise of all his property, or all of his estate, or a general disposition of his land, will not authorize such a deduction.

"But his intention to devise whatever interests he may own in land at his death must be disclosed by the language used, or by the actual import of the provisions contained in the will. (10 B. Mon. 2).

"Story, in his conflict of law, speaking of wills of immovable property or lands, (Sec. 474) says that the law of the place where the property is locally situated is to govern as to the capacity of the testator, the extent of his power to dispose of the property, and the forms and solemnities to give the will or testament its due attestation and effect.

"According to this principle we are to construe the will with an eye to the laws of Missouri, so far as the land situated within her limits is concerned.

"We consider that the case of Ligget vs. Hart, 23 Mo. 127, settles the one now under consideration. That case determines that the power over the after-acquired lands possessed by the testator is the same as that which he possesses over lands which he owned at the making of the will, it is just the same and to be determined on the same considerations as would determine the question whether lands owned by the testator at the date of his will passed by it, or, in other words, that after-acquired lands, as to the power of disposition, rests on the same

ground as the lands owned by the testator at the date of his will and the personal estate. According to this there can be no question but that the lands in Missouri passed by the will."

We call attention again in this connection to the similar case of Doe vs. Wynne, 23 Miss., 251, which appears to place that state also firmly in the same line despite the plaintiffs claims concerning it.

The rule in the case first above should control in the case at Bar. It is for the Connecticut Court to say how certainly the intent must appear in the will, or how necessarily it must be implied, to work an out and out conversion of Connecticut lands, and whether such certainty does appear or is so necessarily implied.

Hale vs Hale, 137 Mass. 168. (1884).
Hobson vs. Hale, 95 N. Y. 588. (1884).
Hale vs. Hale, 125 Ill. 399. (1888).

Three cases concerning the same will and estate. The testator was domiciled in Massachusetts and left a large estate, including lands in each of the three States mentioned.

The Massachusetts Court did not seem to consider anything except the effect of the will as to a specific devise therein of certain Massachusetts real estate; and this is remarkable, if in the opinion of the Massachusetts Court or the distinguished counsel employed, the question of conversion, which was considered so important in the cases in the two other States, should properly have been determined by the Massachusetts Courts or under the Massachusetts laws.

It was claimed in the New York Court that a case of equitable conversion by implication, from the testator's death, for the purposes of investment and distribution, was presented in his general disposition in the residuary clause of the will; and that was the principal question in the case there. That Court considered it at length, and concluded that there was no conversion under the will. The Court reviewed several New York precedents applicable to the question, and evidently based its decision upon the New York precedents alone.

The Illinois Court, in determining the case, also considered the question of conversion, arising under the same general residuary clause, and after defining what intent to convert the will must show to work a conversion, concluded that such an intent did not appear, and continued, saying in part:

> "This precise question was presented to the Court of Appeals of the State of New York by the same parties to this litigation and in an action brought by these executors and trustees, to obtain a construction of certain provisions (same in question in Illinois) of the last will and testament of Ezkiel J. M. Hale, deceased; that Court held after a most elaborate argument, the will, while valid under the laws of Massachusetts, where the testator died and where his will was admitted to probate, contained no express direction for the conversion of the real estate into personalty, or for the sale of the real estate. (Hobson vs. Hale, 95 N. Y. 588). This Court is entirely satisfied with the conclusion reached by the Court of Appeals in that case; and the elaborate discussion there given, to the exact question involved in the case now being considered, would seem to relieve the Court from the necessity of any extended consideration of the question."

There was no suggestion of any deference to the laws of Massachusetts, or to the propriety of any foreign interpretation.

Wurts vs. Page, 19 N. J. Eq. 365. (1869).
Pages Estate, 75 Penn. St. 87. (1874).

Two cases construing the same will. The testator was domiciled in New Jersey and owned real estate in both states. All the real estate in New Jersey had been sold, and most of that in Pennsylvania.

One daughter had married and died subsequent to the father's death. She had been domiciled in Pennsylvania, and her husband was the administrator of her estate in each of the two states, and was a party in each case.

The fourth question was whether the will worked an equitable conversion of the unsold real estate into personalty.

If there was a conversion, the daughter's husband claimed the whole of her share through his marital rights, otherwise it went to her children.

The New Jersey Court considered whether there was any such *express* direction to convert or sell, as worked such a conversion, and concluded:

> "If this were the only part of the will to guide us, the real property could not be considered as converted into personal property until actually sold. But the question of conversion is a question of intention, and the real question is, did the testator intend his lands should be converted into money at all events before its distribution? In this case it seems to me that the directions in other parts of the will show clearly that he did so intend." * * * "All these directions show that he intended that his estate should be converted into money before it was distributed by his trustees; and they would be required to convert it into money before distribution, and to pay it over in that form."

The Supreme Court of Pennsylvania in subsequently construing the same will in settling the daughter's estate, disagreed with the New Jersey construction above. The lower Court had apparently followed the New Jersey decision and had decided that there was a conversion; but this decision was reversed by the Supreme Court. A full statement of the action and decree of the New Jersey Court is set out in the record of the Pennsylvania case, but the latter Court decided contra, that there was no conversion.

The Pennsylvania Court concluded in part:

> "The whole frame of the will, and especially the fourth item, would seem to us to indicate no more than a discretionary power of sale, which would work conversion only when a sale should be made. Hence, on the death of the testator, the real estate passed to his children as real estate, by equitable titles, not as personalty. Mrs. Page having died before actual conversion under the discretionary power contained in the fourth item, her equitable estate decended to her children as realty."

And in a previous part of its opinion the Pa. Court said:

"The question of the conversion of the real estate in Pennsylvania, devised to Mrs. Page, must depend on the will of Wm. Wurts, there being no actual conversion by the trustees under his will in her life time. It, therefore, descended as real estate, unless conversion was wrought by the will itself.

"It has been decided in New Jersey that a conversion arises under the terms of Wm. Wurts' will. We dissent from this with much unwillingness and some hesitation.

"We agree that a conversion may arise, without express terms, when it is clear that a testator meant to create a fund raised out of both real and personal estate, and to bequeath this fund in money alone. But it seems to us the error in this argument is in assuming the only fact from which conversion can fairly be inferred, to wit: An absolute intent to create a consolidated fund out of both real and personal estate, to be distributed in money."

The above case seems quite in point. The Court of the domicile said the father's will implied a conversion. The Court of the situs, subsequently, in settling the daughter's estate, said the father's will *did not* effect a conversion.

Butler vs. Green, 65 Hun. 99, (1892).

The testator was domiciled in New York and left a large estate, including a large amount of real estate in New Jersey and Illinois. Part of the real estate in the two latter States had been sold and the proceeds brought into New York and the question was whether these proceeds could be lawfully held under the trusts in the will, or were intestate, since the trusts would be invalid under the New York statutes against perpetuities.

The Court says in part:

"Mr. Ogden died in this city, and as to the personal property of which he was then possessed the law of his domicile governs. All questions with regard to his real estate must, however, be determined by the lex loci rei sitae. * * * *

"The solution of this question depends primarily upon the intention of the testator. Did he purpose that the attributes of his real property in Illinois and New Jersey should depend upon the will of his executors? The presumption in general is that a testator does not intend the nature of the property to depend upon the option of the person through whom the conversion is to be effected."

And the Court, after considering the question of conversion at some length, concludes:

"It is entirely clear that no equitable conversion was effected at the death of the testator. * * *

"We have discussed this question of conversion as though it were governed solely by the law of this State. This is, we have considered it so far as to determine whether the law of the domicile should act upon the moneys which have been brought into this State. We think, however, that the question is one which should appropriately be determined by the law of Illinois and New Jersey. It is not only the title to real property which is governed by the lex loci rei sitae, *but also the effect and construction of the instrument conveying it.*" * *

"The intention of the testator is to be gleaned from this instrument—that is from the will; and the Courts of the locality have jurisdiction to construe the instrument and to determine all questions which may arise with regard to the title to the property and the rights of the devisees with respect thereto. These questions should be determined by the Courts of the locality so long as the subject matter, whether in the form of real estate or its money representative, is within its jurisdiction.

Where, however, such money representative has been brought within the jurisdiction of the domicile, its Courts should regard the laws of the locality and determine the questions thrust upon them in accordance with such laws."

The above case is especially strong in support of our claim that the courts of the situs have the exclusive right to say whether or not an equitable conversion is to be implied, since it is a statement to that effect by the Court of the domicile itself.

Osburn's Appeal, 104 Pa. St. 637. (1883).
McCartney vs. Osburn, 118 Ill., 403, (1886).
McCartney vs. Osburn, 121 Ill., 408, (1887).
Warner's Estate, 130 Pa. St., 365, (1889).

All concerning the same will and estate. The testator was domiciled in Pennsylvania and owned real estate in both states.

The questions were: Whether under the provision "to be equally divided between the heirs of the said Henrietta that may be living at the time of said distribution and the said Harry G. McCartney, each to share and share alike," the division was to be per stirpes or per capita; whether "heirs" meant "children" or "heirs-at-law" at Henrietta's death, and finally as to the time when the estate was distributable.

The Pennsylvania Court held that "heirs" meant "heirs-at-law;" that the division was per stirpes; and subsequently in the last case, after the Illinois decision, that the distribution might be made at once. The Illinois Court held that "heirs" meant "children;" that the division was per capita, and that the distribution was to be deferred until the youngest child arrived at twenty-one.

The claim also was made in the Illinois Court that the previous decision of the Pennsylvania Court, between the same parties, was conclusive, as well as correct on principle. The counsel for the appellant claimed in the Illinois Court that: "The will should be construed by the laws of the domicile of the testator, and hence the construction put upon the will by the Courts of Pennsylvania should control" and that "the law of the domicile prevails in the interpretation of wills of real estate" citing among other cases: Story on Conflict of Laws, 479 h; Trotter vs. Trotter 4 Bligh, 502; Enolim vs. Wylie 10 H. L. Cas. 1, Crusoe vs. Butler, 36 Miss. 150, Danelli vs. Danelli, 4 Bush 51; and Bible Soc. vs. Pendleton, 7 W. Va. 79.

The Illinois Court said in part:

> "Before a former decision can be successfully invoked as an estoppel in another suit between the same parties,

it must appear that the question is the same in both cases, and that the Court in the former suit had power and jurisdiction to determine it. The controversy here is about the quantum or extent of interest which the parties respectively have in certain lands in the State of Illinois, and the question to be determined as respects the appellant is whether he has a half interest or merely one-ninth.

"As respects the appellees, the question is whether they are each entitled to a ninth or a sixteenth only. It is manifest the Courts of Pennsylvania had no power or jurisdiction to pass upon either of these questions, nor did they attempt to do so. It is true they passed upon a question like these, and the decision upon them as an expression of opinion by that Court is entitled to the highest respect, but that is all. While the decision of that Court is persuasive, it is not imperative. Nor does the fact that this Court, in passing upon these questions, may place a construction upon the will different from that adopted by the Pennsylvania Courts which will lead to a diversity of interests between the devisees in the two States in respect to the same kind of property, make any difference. Such a contingency is the inevitable result of the complete independence of the Courts of the two States in matters within their exclusive jurisdiction.

"The will, through which all the parties claim, is the written evidence of their respective titles and interests in and to the land sought to be partitioned, and the construction to be placed upon it presents a question of law which this Court must determine for itself. While it was entirely competent for the Pennsylvania Courts to construe the will and determine the rights of the parties to the property there, yet they could make no order, decree or ruling with respect to the legal effect of the will, that would deprive this Court of the right to construe that instrument for itself, so far as it relates to lands in this State. Where a testator by a single will devises lands lying in two or more States, the Courts of such States will respectively construe it, as to the lands situated in them respectively, in the same manner as if they had been devised by separate wills."

The same Court, when the same case came up the second time, (121 Ill. 408) again said in part :

> "The decision in that case, (104 Pa. St. 637), on the plainest principles of law conclusively settled the rights of the parties to so much of the realty devised as lies in Pennsylvania, and to the entire personal estate wherever situated or found, but it did not affect the title of the real property outside of that State."

The Pennsylvania Court subsequently, when the same case came up there the second time (130 Pa. St. 365) also affirmed its original decision.

The above case seems to be fully in point here; since it was wholly a question of testamentary construction between the same parties in each state, and the appellants made the same claims in the Illinois Courts made by the plaintiff in error here, namely, that the construction by the Court of the domicile, in a suit between the same parties, should control, and that the will should be interpreted by that law, and even cited most of the authorities relied on by the plaintiff here. Yet the Illinois Court decided otherwise in the manner and for the reasons stated above.

The Connecticut Court in the case before it, might well have paraphrased the criticism of the Lord Chancellor in Arglasse vs. Muschamp, 1 Vern. 75, 77.

This is surely only a jest put upon the jurisdiction of the Connecticut Court by the plaintiff in error; for when it goes about to determine the status of the Connecticut land, he readily tells it that the status of that land has been already determined by the South Carolina judgment; but when it replies that the South Carolina Court was without the jurisdiction to determine the status of Connecticut land, he says that the South Carolina Court acted only in personam and did not attempt to determine the status of any land.

All of which is respectfully submitted,

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